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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KEVIN SPACEY FOWLER a/k/a)	Case No. 2:22-mc-00030
KEVIN SPACEY,)	
)	<i>Pending in the Southern District of</i>
Moving Party,)	<i>New York, Case No. 1:20-cv-09586-LAK</i>
)	
v.)	JOINT STIPULATION REGARDING
)	MOVING PARTY'S MOTION TO
)	COMPEL AND FOR CONTEMPT RE
ADAM VARY)	ADAM VARY'S DEPOSITION AND
)	SUBPOENA FOR PRODUCTION OF
Responding Party.)	DOCUMENTS
)	
)	Judge: TBD
)	Hearing Date: March 2, 2022
)	Hearing Time: 9:30 a.m.
)	
)	Discovery Cutoff Date: January 18, 2022
)	Pretrial Conference Date: N/A
)	Trial Date: February 18, 2022
)	

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JOINT STATEMENT

Pursuant to Federal Rules of Civil Procedure 37 and 45, and C.D. Cal. Local Rule 37-1 *et seq.*, plaintiff Kevin Fowler a/k/a Kevin Spacey Fowler (“Mr. Fowler” or “Moving Party”) and non-party deponent Adam Vary (“Mr. Vary”) have met and conferred regarding discovery of documents and information sought by Mr. Fowler’s Subpoena to Testify at a Deposition in a Civil Action (“Deposition Subpoena”) and Subpoena to Produce Documents, Information, or Objects, or to Permit Inspection of Premises in a Civil Action (“Document Subpoena,” and collectively with the Deposition Subpoena, the “Subpoenas”). Mr. Fowler and Mr. Vary have been unable to reach an agreement at this time, and respectfully submit their positions.

I. INTRODUCTORY STATEMENTS

A. Moving Party Kevin Spacey Fowler’s Introductory Statement Pursuant To C.D. Cal. Local Rule 37-2.1

This discovery dispute concerns a civil lawsuit pending in federal court in the Southern District of New York. The case was brought in late 2020 by plaintiff Anthony Rapp (“Rapp”) alleging assault, battery, and intentional infliction of emotional distress against Mr. Fowler. The lawsuit is nearing trial, with pretrial documents signaling the case is “ready for trial” being due February 18, 2022. As an initial matter, Mr. Fowler respectfully requests that the Court transfer this dispute to the Southern District of New York under Federal Rule of Civil Procedure 45(f). Such transfer would promote judicial economy and efficiency because the trial judge in the Southern District of New York, The Honorable Lewis Kaplan, is intimately familiar with the facts and history of this case, and it is rapidly approaching trial.

Rapp’s claims all are based on an alleged incident in approximately 1986 when Mr. Fowler purportedly picked up Rapp, lifted him onto a bed, and laid on top of him. Rapp has acknowledged Mr. Fowler’s alleged “sexual advance” involved no touching of genitals, no kissing, no undressing of either Rapp or himself or any attempt to do so, and no sexualized statements or other statements suggesting an intent to engage in any such conduct. Mr. Fowler categorically denies the allegations.

1 Rapp's claims were initially publicized in a *Buzzfeed* article published on October
2 29, 2017 and written by Rapp's longtime friend, Adam Vary. During discovery, Mr.
3 Fowler served Mr. Vary with deposition and documents subpoenas seeking information
4 about his communications with Rapp since they became friends over twenty years ago,
5 the preparation and circumstances of the *Buzzfeed* articles, and related matters. In
6 particular, Rapp produced texted messages with Mr. Vary which showed that Rapp
7 initially told Mr. Vary a version of his story that had demonstrably false details. Those
8 details were omitted or corrected in the final article, apparently as part of an express or
9 implied understanding that Rapp would provide his story to his friend if Mr. Vary
10 sanitized the article to protect Rapp from scrutiny for his inconsistencies and false details.

11 But during his deposition, and in response to the records subpoena, Mr. Vary
12 refused to answer questions, about any communication with Rapp other than what was
13 explicitly published in Mr. Vary's 2017 *Buzzfeed* article or a follow-up article in 2018.
14 Mr. Vary followed his counsel's instruction not to answer questions about Mr. Vary's
15 conversations with Rapp, Mr. Vary's investigation or view of Rapp's allegations, or even
16 foundational issues related to Mr. Vary's vetting of Rapp's claims (or his failure to
17 factcheck them). Mr. Vary further refused to answer whether he deliberately altered or
18 omitted demonstrably false details of Mr. Rapp's account when seeking comment from
19 Mr. Fowler. Mr. Vary also produced no documents in response to the records subpoena
20 and even acknowledged he did not even attempt to look for any documents responsive to
21 the subpoena.

22 To justify his refusal to provide discovery, Mr. Vary relied primarily on a qualified
23 "reporter's privilege" under the First Amendment and a "reporter's shield" under
24 California law. But neither applies here. As an initial matter, the only possible
25 application of either doctrine applies to a narrow set of circumstances that Mr. Vary has
26 not demonstrated apply here, or at least not to each question and document request.

27 Even if there were protection under the First Amendment, the protection is
28 qualified, and it must give way when the requested material is unavailable despite efforts

1 to obtain it elsewhere, is noncumulative, and is clearly relevant to an important issue in
 2 the case. Here, all of these factors are present. Rapp's credibility and the details of his
 3 allegations are critical issues that will be the focus of the upcoming trial. Mr. Fowler has
 4 deposed and taken written discovery from Rapp but Rapp has testified he does not recall
 5 all details of what he told Mr. Vary. The only way to obtain that critical evidence is from
 6 Mr. Vary and any notes, recordings, or other documents he may have in his possession.

7 Likewise, California's reporter's shield law does not apply. If anything, New
 8 York's reporter's shield applies because New York has a greater interest in this case,
 9 given the case is pending there, New York law applies to the dispute, Rapp is a citizen
 10 in New York, and BuzzFeed – which published Mr. Vary's articles at issues – is located
 11 in New York. And New York's reporter's shield provides only qualified protection
 12 similar to that under the First Amendment test described above. And, finally, even if
 13 California's "absolute" reporter's shield law were to apply, it still have been found not
 14 to apply where it impedes a criminal defendant's rights. Because Rapp's claims are
 15 premised on conduct he must show constitutes criminal conduct under New York's penal
 16 law, the same balancing test should apply and weigh in favor of disclosure.

17 Mr. Fowler therefore respectfully requests that the Court grant his motion and find
 18 Mr. Vary to be in contempt unless he sits for a supplemental deposition to answer the
 19 question he previously refused to answer (plus all reasonable follow up questions) and
 20 produces documents in response to the requests in the documents subpoena.

21 **B. Responding Party Adam Vary's Introductory Statement Pursuant to**
 22 **C.D. Cal. Local Rule 37-2.1**

23 Non-party Adam Vary is a journalist, and his only connection to this case is in his
 24 capacity as a journalist. In 2017, Vary authored an article for his former employer
 25 *BuzzFeed* about famous actor Kevin Spacey Fowler's (p/k/a Kevin Spacey) sexual
 26 advance on actor Anthony Rapp, who was only 14 years old at the time. Jassy Decl. ¶ 3,
 27 Ex. 10; *see also* Jassy Decl. ¶ 2; *id.*, Ex. 11 at 70:7-11, 77:17-90:16, 90:2-93:22 (Vary
 28 work history). Fowler did not claim that Vary's article was false in any way; rather,

1 Fowler tweeted that he did not remember the encounter with Rapp, and apologized for
2 “what would have been deeply inappropriate drunken behavior.” Ex. 10 at 4. Four years
3 later, Fowler issued three document subpoenas (each with at least 29 requests for
4 production), and deposed Vary for more than seven hours. Jassy Decl. ¶¶ 4-5. Now,
5 *after* the discovery cut-off and *after* the ready date for the start of trial, Fowler wants to
6 depose Vary again—this time with the specific goal to invade his journalistic processes
7 and unpublished information. On several grounds, this motion should fail.

8 As a preliminary matter, Fowler’s motion is procedurally defective for many reasons: (1)
9 it is late—filed after the discovery cut-off, to be heard after the trial ready date; (2) it fails
10 to comply with L.R. 37-1, 37-2.1, and L.R. 37-3; and (3) it suffers other procedural
11 defects enumerated below. Fowler makes a passing request to transfer this motion, but
12 the motion must be heard in “the district where compliance is required” – *i.e.*, in this
13 Court – unless Vary consents (he does not) or there are “exceptional circumstances.”
14 F.R.C.P. 45(d)(2)(B)(i). Fowler articulates no such “exceptional circumstances.”

15 The motion also fails for substantive reasons. The premise of Fowler’s motion is
16 also its fundamental defect—Fowler seeks unpublished newsgathering and reporting
17 information, which is protected from disclosure under state, federal and common law.
18 California’s Constitution provides an unqualified *absolute* protection from disclosure in
19 civil cases. Fowler has no competing constitutional right that can overcome Vary’s right
20 to keep his unpublished information confidential. Fowler incorrectly asserts that New
21 York, not California law, should apply to this discovery dispute. A basic conflict of law
22 analysis proves this wrong. Vary is, and at all relevant times was, a California resident,
23 and California has a strong interest in protecting the constitutional rights of its citizens.¹
24 In another desperate attempt to avoid California law, Fowler claims, in a motion brought
25 under Federal Rule of *Civil* Procedure 45, that this is not really a civil case. Nonsense.
26 When Fowler’s counsel was asked in the meet and confer process, “If Fowler loses this
27

28 ¹ Fowler notes that Rapp is in New York, but the subpoenas were not directed to
Rapp. Nor were the subpoenas directed to BuzzFeed, Vary’s *former* employer.

1 civil case that would mean that he is a criminal?,” his counsel candidly replied: “Of
2 course not.” He faces no *criminal* liability at all. Because this is a civil case, with Rapp
3 asserting civil claims of assault, battery, and intentional infliction of emotional distress,
4 California law completely insulates Vary from having to share any unpublished
5 information.

6 Vary is also protected by the Ninth Circuit’s qualified First Amendment reporter’s
7 privilege. To overcome that privilege, it is Fowler’s burden to show that each piece of
8 information or document he seeks is clearly relevant to his case, not cumulative, and
9 unavailable from any other sources. Fowler glosses over this burden in a general way,
10 and makes *no effort* to show he can satisfy it as to *each* deposition question and *each*
11 document demand. Unpublished information about Vary’s work is not clearly relevant
12 to this case. This case is not about the veracity of Vary’s articles or Vary’s state of mind.
13 In many of his questions, Fowler’s counsel simply asserted that some fact was incorrect
14 or unaccounted for, and then demanded to know why it was not published in Vary’s
15 articles. Much of the requested information could be sought from other sources,
16 including the very sources that Fowler is asking about, such as a Mr. Barrowman. To
17 the extent Fowler’s point is that Rapp has discrepancies in his story, that can be proven
18 (or not) without piercing Vary’s privilege, and anything Vary might (or might not) offer
19 would be cumulative.

20 As to the Deposition Subpoena, Fowler wants Vary to testify about *unpublished*
21 information about Vary’s journalistic techniques, sources and interviews specifically
22 concerning his reporting on the Fowler matter. Almost every time Vary’s counsel made
23 an objection/instruction on reporter’s shield/privilege grounds, Vary’s counsel only
24 made it “to the extent” the question called for *unpublished* information, but consistently
25 noted that Vary could “otherwise answer the question.” And Vary did just that. As
26 Fowler acknowledges—Vary already testified in deposition about *published* information.
27 He did not indiscriminately refuse to answer seven hours of questioning. He did not
28 move to quash the entire subpoena. He only declined to answer where he determined

1 that it would invade the protections afforded him as a journalist. In addition to testifying
2 about published information, he also testified about information separate from his news
3 reporting—*e.g.*, concerning his friendship with Rapp, BuzzFeed’s finances and
4 communications with Rapp’s counsel.

5 Vary drew consistent lines for the Document Subpoena: (1) he offered published
6 articles concerning Fowler, but they were rejected; (2) he produced his limited
7 communications with Rapp’s counsel; (3) he would *not* produce unpublished
8 newsgathering information because of the reporter’s privilege/shield; and (4) he would
9 not undertake to search for or produce irrelevant documents – *i.e.*, documents that did
10 not relate to Fowler, Rapp and the allegations in this case – unless Fowler could articulate
11 a reason they were relevant, which did not happen. Fowler also insists on a privilege log
12 even though Vary already explained categorically what was being withheld pursuant to
13 the reporter’s privilege, and Fowler ignored Vary’s authorities exempting non-parties
14 from preparing logs under such circumstances.

15 Fowler’s counsel was obligated to take “reasonable steps to avoid imposing undue
16 burden or expense” on a subpoenaed non-party. FRCP 45(d)(1). Instead, Fowler
17 continues to harass Vary. Vary requests that Fowler’s motion be denied in full, and that
18 \$18,000 in fees and costs be awarded to Vary.

19 **II. MR FOWLER’S BRIEF SUMMARY OF DISCOVERY AT ISSUE**

20 **A. Adam Vary Refused To Answer Questions At Deposition**

21 Adam Vary was deposed remotely on December 16, 2021. One focus of the
22 deposition was Mr. Vary’s discussions with Rapp in October 2017 when Rapp contacted
23 Mr. Vary about doing a story about Rapp’s allegations against Mr. Fowler. Mr. Vary’s
24 initial article on the subject was published on October 29, 2017 by *Buzzfeed*. Mr. Vary
25 also did a follow up article in 2018 for which he also spoke with Rapp.

26 During the deposition, Mr. Vary’s counsel instructed him not to answer, and Vary
27 refused to answer, questions about Rapp’s communications with Vary other than what
28

1 was expressly published in Mr. Vary's articles. The full questions, objections, and
2 instructions not to answer are set forth in Section III below.

3 **B. Document Subpoenas To Adam Vary**

4 Besides the oral deposition, Rapp also separately subpoenaed documents from Mr.
5 Vary. Mr. Fowler's initial document subpoena was issued on November 4, 2021.
6 Following discussions with counsel, Mr. Fowler issued a second subpoena on December
7 6, 2021, calling for production of documents shortly before Mr. Vary's deposition. Mr.
8 Vary produced no documents at his deposition.

9 After the deposition, during the parties' meet and confer, Mr. Vary's counsel
10 reiterated an objection that the subpoena had been issued on letterhead from this Court,
11 rather than the Southern District of New York where this action is pending. On
12 December 29, 2021, Mr. Fowler responded to that perceived concern by re-issuing and
13 re-serving a documents subpoena issued by the Southern District of New York ("Records
14 Subpoena"). That subpoena also dropped one of the document requests. On January 12,
15 2022, Mr. Vary objected to that subpoena. Mr. Vary's objections set forth the same
16 objections. He produced no documents.

17 The document requests in the Records Subpoena, Mr. Vary's objections to them,
18 and each party's position on them is set forth below.

19 **C. Counsel for the Parties Complied With Local Rule 37-1 Pre-Filing**
20 **Conference**

21 On December 29, 2021, Mr. Fowler's counsel sent a letter to Mr. Vary's counsel
22 to initiate a meet and confer under C.D. Cal. Local Rule 37-1. See Scolnick Decl., Ex.
23 6. Vary's counsel responded in writing on January 5, 2022. *Id.*, Ex. 7. Under Local
24 Rule 37-1, counsel for the parties had a telephonic meet and confer on January 10, 2022.
25 *Id.*, ¶ 8. Counsel also had a conference on January 18, 2022. *Id.*, ¶ 8. The parties could
26 not resolve this discovery dispute.

1 **III. MR. VARY'S RESPONSE TO MR. FOWLER'S "BRIEF SUMMARY OF**
 2 **DISCOVERY AT ISSUE**

3 Vary objects to, and moves to strike, Fowler's "Brief Summary of Discovery at
 4 Issue" as an improper and overlong extension of Fowler's introductory statement in
 5 violation of Local Rule 37-2.1.

6 **IV. MR. VARY'S DEPOSITION**

7 **A. Specific Deposition Conduct At Issue**

8 These excerpts of testimony show the deposition questions, objections,
 9 instructions, and limited responses, at issue on this motion:²

10
 11 1. Page 21, Line 16 to Page 22, Line 21

12 16 Q. And why did you reach out to Mr. Rapp over the
 13 17 summer?

14 18 A. There were reports that Kevin Spacey had been
 15 19 performing in a big feature film, and a colleague at
 16 20 Variety was writing about that, and I had been asked to
 17 21 ask if Anthony had comment on that -- for that story.

18 22 Q. And did Anthony have comment on that story?

19 23 A. He did not.

20 24 Q. Did Mr. Rapp discuss Mr. Fowler with you on
 21 25 that call?

00022

22 1 MR. JASSY: Objection. To the extent -- Madam
 23 2 Court Reporter, can you hear me okay?

24 3 DEPOSITION OFFICER: Yes.

25 4 MR. JASSY: Okay. I'm going to start a
 26 5 standing objection here because I have a feeling this
 27 6 may come up again, Mr. Scolnick. I'm going to object on
 28 7 the basis of the reporter's shield and the reporter's
 8 privilege. And what I mean by that is the privilege and
 9 the shield that's rooted in the 1st and 14th Amendments
 10 of the United States Constitution, the Article I,

26 ² The relevant pages of Mr. Vary's deposition transcript are attached as an Exhibit
 27 to the Declaration of Chase Scolnick. Mr. Fowler respectfully requests that Mr. Vary be
 28 ordered to sit for another deposition to answer all of these questions, plus reasonable
 follow up questions. Vary, who already sat for over seven hours of deposition, opposes
 Fowler's request.

11 Section 2 of the California Constitution, Section 1070
 12 of the California Evidence Code, Rule 501 of the Federal
 13 Rules of Evidence, state analogs and other states, for
 14 example, New York, and also the common law.
 15 And so I'm going to assert the -- to that last
 16 question the reporter's privilege and the reporter's
 17 shield and instruct the witness not to answer to the
 18 extent that it would call for or require the disclosure
 19 of information obtained or sought to be obtained or
 20 gathered in the course of news-gathering. But if he can
 21 answer -- revealing such information, he may do so.

2. Page 40, Lines 4 to 12

4 Q. Why did you suggest using Signal to communicate
 5 with Mr. Rapp?

6 MR. JASSY: Objection. Reporter's shield.
 7 Reporter's privilege. It calls for unpublished
 8 news-gathering information.

9 I instruct the witness not to answer, unless he
 10 feels he's able to do so.

11 THE WITNESS: I am following my attorney's
 12 advice not to answer.

3. Page 42, Lines 5 to 12

5 Q. What, if anything, did you do to search for
 6 responsive documents to this request?

7 MR. JASSY: Objection.

8 To the extent it calls for the disclosure of
 9 attorney-client privileged information, I instruct the
 10 witness not to answer.

11 THE WITNESS: Following my attorney's advice
 12 not to answer.

4. Page 48, Lines 9 to 23

9 Q. After the initial off-the-record conversation
 10 you had with Mr. Rapp about Mr. Fowler, you had
 11 additional conversations with Mr. Rapp about Mr. Fowler;
 12 correct?

13 A. Yes.

14 Q. And in any of those subsequent conversations,
15 did Mr. Rapp tell you that the communications about
16 Mr. Fowler were confidential?

17 MR. JASSY: Objection. Calls for the
18 disclosure of unpublished information and -- on the
19 basis of the reporter's shield and reporter's privilege.
20 And instruct the witness not to answer, unless
21 he's otherwise able to do so.

22 THE WITNESS: Based on my -- my counsel's
23 advice, I'm not answering that question.

9
10 5. Page 64, Line 20 to Page 66, Line 1

11 20 Q. Have you ever spoken with Mr. Rapp about the
12 21 content of his book?

13 22 MR. JASSY: Objection to the extent it calls
14 23 for the disclosure of unpublished news-gathering
15 24 information. I object on the grounds of the reporter's
16 25 privilege and the reporter's shield.

00065

17 1 And I instruct the witness not to answer,
18 2 unless he may otherwise do so.

19 3 THE WITNESS: Prior to 2017 I probably told him
20 4 that I found the book very moving and enjoyed it. I
21 5 don't recall saying to him much more -- anything more
22 6 than that.

23 7 BY MR. SCOLNICK:

24 8 Q. And you separated that out to prior to 2017.
25 9 Why was that?

26 10 MR. JASSY: Well, same objection and
27 11 instruction as the last question.

28 12 THE WITNESS: I refer -- I will -- in response
29 13 to the -- your most recent question, I am following my
30 14 attorney's advice not to respond.

31 15 BY MR. SCOLNICK:

32 16 Q. Have you ever written a story about Mr. Rapp's
33 17 book?

34 18 A. I don't recall ever doing that.

35 19 Q. Did you ever intend to write a story about
36 20 Mr. Rapp's book?

37 21 MR. JASSY: Objection. Calls for the
38 22 disclosure of reporter's shield or reporter's privilege

23 information.

24 Instruct the witness not to answer.

25 THE WITNESS: I'm following my attorney's
00066

1 advice and not answering.

6. Page 119, Lines 4 to 13

4 Q. Did you intentionally omit any details of
5 Mr. Rapp's account and allegations in your story?

6 MR. JASSY: Objection. To the extent that it
7 calls for the disclosure of unpublished material, object
8 on the basis of the reporter's privilege and the
9 reporter's shield.

10 Instruct the witness not to answer. He may
11 answer, if he believes he can.

12 THE WITNESS: On advice of my attorney, I'm not
13 answering that question.

7. Page 120, Line 22 to Page 121, Line 9

22 Q. So Mr. Rapp provided you a detail about the
23 last time he had seen Mr. Fowler; right?

24 A. Yes.

25 Q. You determined that detail was not accurate;
00121

1 right?

2 MR. JASSY: Objection.

3 To the extent that it calls for the disclosure
4 of unpublished information. Instruct the witness not to
5 answer. Otherwise, he can answer the question.

6 Objection is based on the reporter's privilege
7 and the reporter's shield.

8 THE WITNESS: On my attorney's advice, I'm not
9 answering the question.

8. Page 121, Line 22 to Page 122, Line 17

22 Q. Okay. So Mr. Rapp told you that the last time
23 he had seen Spacey was at the 2008 Tonys. You
24 determined that Mr. Spacey did not present at the 2008

25 Tonys; right?

00122

1 MR. JASSY: Object to the extent that it calls
2 for disclosure of unpublished information, based on the
3 reporter's privilege and the reporter's shield.

4 I instruct the witness not to answer, unless he
5 feels he can.

6 THE WITNESS: We published that Kevin Spacey
7 and Anthony Rapp were at the 1999 Tony Awards.

8 BY MR. SCOLNICK:

9 Q. Even though Mr. Rapp initially told you that he
10 and Mr. Fowler were at the 2008 Tony Awards; correct?

11 MR. JASSY: Objection based on the reporter's
12 privilege and the reporter's shield because it's asking
13 for unpublished information.

14 To that extent, I instruct the witness not to
15 answer, unless he's able to.

16 THE WITNESS: By attorney's advice, I'm not
17 answering that question.

9. Page 123, Line 12 to Page 124, Line 21

12 Q. And you were writing that to protect Mr. Rapp
13 from being contradicted about an inaccurate statement
14 that he made to you; right?

15 MR. JASSY: Objection.

16 MR. SAGHIR: Objection.

17 MR. JASSY: Peter, if you want make your
18 objection, then I'll make mine.

19 MR. SAGHIR: Yeah. Just objection as --
20 objection as the question -- the statement
21 mischaracterizing testimony.

22 MR. JASSY: That's right. In -- I guess under
23 the New York rules, he can just object as to form;
24 right? But I'll -- I'll go -- I'll go a little further.

25 Objection to the extent that it calls for the disclosure

00124

1 of unpublished information. And the objections on the
2 basis of the reporter's shield and the reporter's
3 privilege.

4 Instruct the witness not to answer to that
5 extent. Otherwise, he can answer.

6 And I also object that the question's

7 argumentative.

8 THE WITNESS: On the advice of my attorney, I
9 am declining to answer that question.

10 BY MR. SCOLNICK:

11 Q. Okay. Let me phrase it a little differently.

12 Were you trying to protect Mr. Rapp from being
13 contradicted publicly?

14 MR. JASSY: Objection. Same objections.
15 Argumentative. Reporter's shield. Reporter's
16 privilege.

17 And to the extent that it calls for unpublished
18 information. Instruct the witness not to answer; but he
19 can if he's otherwise able to.

20 THE WITNESS: On advice of my attorney, I'm not
21 answering.

12 10. Page 128, Line 23 to Page 129, Line 6

13 23 Q. Did Mr. Rapp ever tell you why he came to you
14 24 with this story?

15 25 MR. JASSY: Objection. Reporter's privilege.

00129

16 1 Reporter's shield.

17 2 To the extent it calls for unpublished
18 3 information, I instruct the witness not to answer.
19 4 Otherwise, he may do so.

20 5 THE WITNESS: On the advice of my attorney, I'm
21 6 not responding to that question.

22 11. Page 140, Lines 8 to 18

23 8 Q. Mr. Vary, didn't Mr. Rapp tell you that another
24 9 media outlet was trying to scoop you on this story in
25 10 October of 2017?

26 11 MR. JASSY: Objection. To the extent it calls
27 12 for the disclosure of unpublished information, I object
28 13 on the basis of reporter's privilege and the reporter's
14 shield.

15 And I instruct the witness not to answer.
16 Otherwise, he may do so.

17 THE WITNESS: On advice of my attorney, I am
18 not answering that question.

12. Page 141, Lines 16 to 25

16 Q. Okay. So you were discussing with Mr. Rapp the
17 potential that you'd be scooped on his allegations
18 against Mr. Fowler in October; right?

19 MR. JASSY: To the extent it calls for
20 disclosure of information not published -- the public, I
21 object on the basis of the reporter's privilege and the
22 reporter's shield and instruct the witness not to
23 answer. Otherwise, he may do so.

24 THE WITNESS: On the advice of my attorney, I'm
25 not answering that question.

13. Page 142, Line 7 to Page 145, Line 2

7 Q. Turning to Page -- Page 31 of Exhibit 103.
8 Thirty-two. I'm sorry. We talked about this exchange
9 earlier. And I wanted to focus on the last sentence of
10 the top exchange that you have with Mr. Rapp.

11 And you told Mr. Rapp that, quote, Similarly,
12 we're also going to steer away from exact specificity in
13 the story for the party.

14 Did I read that correctly?

15 A. You did.

16 Q. And what you're referring to is your decision
17 to not include specific details about the party at which
18 Mr. Rapp made his allegations; correct?

19 MR. JASSY: Objection. To the extent it calls
20 for the disclosure of unpublished information, I object
21 on the basis of the reporter's privilege and the
22 reporter's shield.

23 And I instruct the witness not to answer,
24 unless he may otherwise do so.

25 THE WITNESS: On the advice of my attorney, I'm

00143

1 not answering.

2 BY MR. SCOLNICK:

3 Q. Mr. Vary, were you trying to omit details from
4 your story that Mr. Fowler or anyone in the public could
5 see were inaccurate with Mr. Rapp's story?

6 MR. JASSY: Objection. Vague.

7 And to the extent that it calls for the
8 disclosure of unpublished information protected by the

1 9 attorney -- excuse me -- the reporter's privilege and
2 10 the reporter's shield, I instruct the witness not to
3 11 answer. Otherwise, he may do so.
4 12 THE WITNESS: On the advice of my attorney, I
5 13 am not answering that question.
6 14 BY MR. SCOLNICK:
7 15 Q. Were you attempting to omit details in your
8 16 article regarding Mr. Rapp's account of his allegations
9 17 against Mr. Fowler to protect Mr. Rapp from being
10 18 contradicted publicly?
11 19 MR. JASSY: Objection. Asked and answered.
12 20 And I object on the basis of the reporter's privilege
13 21 and the reporter's shield and instruct the witness not
14 22 to answer on the grounds that it's unpublish -- calling
15 23 for unpublished information. But if he can answer, he
16 24 may do so.
17 25 THE WITNESS: On the advice of my attorney, I'm
18 00144
19 1 not answering that question.
20 2 BY MR. SCOLNICK:
21 3 Q. What specific details about Mr. Rapp's
22 4 allegations against Mr. Fowler did you decide to steer
23 5 away from in your article?
24 6 MR. JASSY: Objection.
25 7 To the extent it calls disclosure of
26 8 unpublished information protected from disclosure by the
27 9 reporter's shield and the reporter's privilege, I
28 10 instruct the witness not to answer. Otherwise, he may
29 11 do so.
30 12 And it lacks foundation.
31 13 THE WITNESS: On the advice of my attorney, I'm
32 14 not answering that question.
33 15 BY MR. SCOLNICK:
34 16 Q. Did you intend to omit specific details of
35 17 Mr. Rapp's allegations in your article so that
36 18 Mr. Fowler could not fairly respond to the allegations?
37 19 MR. JASSY: Objection. Lacks foundation.
38 20 Misleading. Argumentative. And to the extent it calls
39 21 for the disclosure of unpublished information, I object
40 22 on the basis of the reporter's privilege and the
41 23 reporter's shield.
42 24 And instruct the witness not to answer.
43 25 Otherwise, he may do so.
44 00145

1 THE WITNESS: Advice of my attorney, I am not
2 answering that question.

3
4 14. Page 146, Lines 2 to 13

5 2 Do you recall Mr. Rapp voicing any objection to
6 3 you changing any of the details that he told you?

7 4 MR. SAGHIR: Objection. Argumentative.
8 5 Assuming facts not in evidence. And mischaracterizing
9 6 testimony.

10 7 MR. JASSY: Lacks foundation. And to the
11 8 extent it calls for disclosure of unpublished
12 9 information, I invoke the reporter's privilege and the
13 10 reporter's shield and instruct the witness not to
14 11 answer. Otherwise, he may do so.

15 12 THE WITNESS: I -- on advice of my attorney,
16 13 I'm not answering that question.

17
18 15. Page 147, Lines 6 to Page 148, Line 1

19 6 My question was, Did Mr. Rapp object to you
20 7 omitting any details from his account before you
21 8 published?

22 9 MR. SAGHIR: Objection. No foundation.

23 10 MR. JASSY: Same objections as the last
24 11 question. And same instruction.

25 12 THE WITNESS: On the advice of my attorney, I'm
26 13 not answering that question.

27 14 BY MR. SCOLNICK:

28 15 Q. Okay. Did you believe in October 2017 that it
1 16 would be more difficult for Mr. Fowler to defend himself
2 17 or respond to these allegations if you omitted certain
3 18 details from Mr. Rapp's account?

4 19 MR. JASSY: Objection. Lacks foundation.
5 20 Argumentative. Calls for speculation.

6 21 And to the extent that it seeks unpublished
7 22 information, object on the basis of the reporter's
8 23 shield and the reporter's privilege. Instruct the
9 24 witness not to answer. Otherwise, he may do so.

10 25 THE WITNESS: On the advice of my attorney, I'm

11 00148

12 1 not answering that question.

16. Page 149, Lines 8 to 19

8 Q. Okay. So you were letting Mr. Rapp know that
9 you had reached out to Mr. Fowler's team that Saturday;
10 right?

11 MR. JASSY: Objection. Best Evidence Rule.
12 And it misstates prior testimony. And it's misleading.
13 And to the extent that it calls for the
14 disclosure of unpublished information. Instruct the
15 witness not to answer on the grounds of the reporter's
16 privilege and the reporter's shield. Otherwise, he may
17 do so.

18 THE WITNESS: On the advice of my attorney, I'm
19 not answering that question.

17. Page 157, Line 13 to Page 158, Line 12

13 My question to you, to be very specifically --
14 excuse me -- very specific, is, Was it or was it not
15 important to you in October 2017 that you accurately
16 conveyed to Mr. Spacey's team the allegations as
17 Mr. Rapp told them to you?

18 A. On the advice of my --

19 MR. JASSY: Hang on.

20 Objection. Asked and answered. Same
21 objection. Same instructions as the last two questions.

22 THE WITNESS: On advice of my attorney, I'm not
23 answering that question.

24 BY MR. SCOLNICK:

25 Q. Did you accurately convey the content of the

00158

1 allegations that Mr. Rapp provided to you?

2 MR. JASSY: Objection. Vague.

3 MR. SAGHIR: Objection.

4 MR. JASSY: To the extent that it calls for the
5 disclosure of information protected from disclosure by
6 the reporter's shield and the reporter's privilege,
7 instruct the witness not to answer. Otherwise, he can
8 answer the question.

9 MR. SAGHIR: Join. Objection. Vague.
10 Overbroad.

11 THE WITNESS: On the advice of my attorney, I'm
12 not answering the question.

18. Page 159, Line 9 to Page 160, Line 23?

9 So here's my question. Did you believe that in
10 this e-mail that's on our screen at the bottom of
11 Exhibit 112 that it was important to accurately convey
12 Mr. Rapp's allegations as he told them to you, to
13 Mr. Fowler's team?

14 MR. JASSY: Asked and answered I think for the
15 fifth time. And to the extent it calls for the
16 disclosure of unpublished information, I -- or is asking
17 for -- or hinting at that there is unpublished
18 information that you're trying to get at, also lacks
19 foundation.

20 I instruct the witness not to answer on the
21 basis of the reporter's privilege and the reporter's
22 shield. Otherwise, he can answer the question.

23 THE WITNESS: On advice of my attorney, I'm not
24 answering that question.

25 ///

00160

1 BY MR. SCOLNICK:

2 Q. Okay. So let's look at the text of the e-mail.

3 Is it big enough for you to see?

4 A. Yes.

5 Q. Okay. You said, starting the second sentence,
6 "The facts in this story are based on primary accounts
7 from Anthony Rapp, but we wanted to take this step to
8 ensure that there is no confusion about what we plan to
9 publish to give you a fair opportunity to correct any
10 perceived errors or otherwise respond to our reporting."

11 Did I read that correctly?

12 A. Yes.

13 Q. This was the same day that this article would
14 be published; right?

15 A. According to the time stamp, yes, it was.

16 Q. And it was also several weeks after Mr. Rapp
17 first approached you with his allegations; right?

18 A. Three weeks later, yes.

19 Q. It was after you had the opportunity to prepare
20 a first draft; right?

21 A. Yes.

22 Q. Is that a yes?

23 A. Yes. Correct.

19. Page 164, Lines 6 to 16

6 Q. Why didn't you reach out earlier to
7 Mr. Fowler's team to ask for a response? What I mean by
8 "earlier" is before October 28th.

9 MR. JASSY: Objection. Lacks foundation. And
10 to the extent it calls for the disclosure of unpublished
11 information, object based on the reporter's privilege
12 and reporter's shield.

13 Instruct the witness not to answer. Otherwise,
14 he may do so.

15 THE WITNESS: On the advice of my counsel, I'm
16 not responding to that question.

20. Page 166, Lines 13 to 25

13 Q. Was it your choice to contact Mr. Fowler's team
14 and include the details of Mr. Rapp's allegations for
15 the first time on the day the article was to be
16 published?

17 MR. JASSY: Objection. Lacks foundation.
18 Misstates prior testimony. And to the extent it calls
19 for the disclosure of unpublished information, I object
20 on the basis of the reporter's shield and the reporter's
21 privilege.

22 Instruct the witness not to answer. Otherwise,
23 he may do so.

24 THE WITNESS: On the advice of my attorney, I'm
25 not answering that question.

21. Page 167, Lines 2 to 20

2 Q. Last sentence of Point 1 you said, "Rapp
3 alleges that, the best of his recollection, he has never
4 heard from nor spoken with Spacey since that night
5 besides seeing him on the set of the film of 'Six
6 Degrees of Separation' and seeing him again before the
7 1999 Tony Awards."

8 Did I read that correctly?

9 A. You did.

10 Q. Isn't it true that Mr. Rapp told you that he
11 last saw Mr. Fowler at the two thousand -- at the 2008

1 12 awards ceremony?
 2 13 MR. JASSY: Object on the basis -- or I object
 3 14 to the extent that it calls for disclosure of
 4 15 unpublished information based on the reporter's
 5 16 privilege and the reporter's shield.
 6 17 But to the extent that Mr. Vary believes he can
 7 18 testify on it, he may.
 8 19 THE WITNESS: On the advice of my attorney, I
 9 20 am not going to answer that question.

10 22. Page 167, Line 22 to Page 168, Line 8

11 22 Q. Were you concerned in this e-mail, when you
 12 23 wrote it to Mr. Fowler's team, that you were not
 13 24 accurately conveying what Mr. Rapp had told you?
 14 25 MR. JASSY: Objection. Misstates prior
 15 00168
 16 1 testimony. Lacks foundation. And to the extent it
 17 2 calls for the disclosure of unpublished information, I
 18 3 object on the basis of the reporter's shield and
 19 4 reporter's privilege.
 20 5 Instruct the witness not to answer. Otherwise,
 21 6 he may.
 22 7 THE WITNESS: On the advice of my attorney, I'm
 23 8 not answering that question.

24 23. Page 170, Lines 2 to 10

25 2 Q. Did you refer to your correspondence to
 26 3 Mr. Fowler's team as a no-surprise e-mail?
 27 4 MR. JASSY: Objection to the extent it calls
 28 5 for the disclosure of unpublished information.
 29 6 I instruct the witness not to answer on the
 30 7 grounds of the reporter's privilege and the reporter's
 31 8 shield. Otherwise, he may do so.
 32 9 THE WITNESS: On the advice of my attorney, I
 33 10 am not responding to that question.

34 24. Page 171, Line 20 to Page 172, Line 5

35 20 Q. If a no-surprise e-mail is, as you said, good

1 21 journalism, then why did you not send a no-surprise
 2 22 e-mail before October 29, 2017?
 3 23 MR. JASSY: Objection. Lacks foundation.
 4 24 To the extent that it calls for disclosure of
 5 25 unpublished information based on the reporter's shield
 6 00172

7 1 and the reporter's privilege, I instruct the witness not
 8 2 to answer. Otherwise, he may answer the question.

9 3 MR. SAGHIR: Join.

10 4 THE WITNESS: On advice of my attorney, I'm not
 11 5 answering that question.

12 25. Page 173, Line 24 to Page 174, Line 18

13 24 Q. Mr. Vary, you learned the identity of
 14 25 Mr. Rapp's friend from Joliet before this article
 15 00174

16 1 published; right?

17 2 MR. JASSY: To the extent it calls for the
 18 3 disclosure of unpublished information, instruct the
 19 4 witness not to answer based on the reporter's privilege
 20 5 and the reporter's shield. Otherwise, he may do so.

21 6 THE WITNESS: On the advice of my attorney, I'm
 22 7 not answering that question.

23 8 BY MR. SCOLNICK:

24 9 Q. Mr. Rapp told you before you published this
 25 10 article that his friend from Joliet was a man named John
 26 11 Barrowman; right?

27 12 MR. JASSY: Objection.

28 13 To the extent it calls for the disclosure of
 1 14 unpublished information, instruct the witness not to
 2 15 answer on the grounds of the reporter's privilege and
 3 16 the reporter's shield. Otherwise, he may do so.

4 17 THE WITNESS: On the advice of my attorney, I
 5 18 am declining to answer that question.

6 26. Page 177, Line 7 to Page 178, Line 21

7 7 Q. Have you ever tried Googling Mr. Barrowman to
 8 8 determine his birthday?

9 9 MR. JASSY: Objection.

10 10 To the extent it calls for the disclosure of

11 unpublished information protected from disclosure by
 12 the -- and news-gathering information protected from
 13 disclosure by the reporter's shield and reporter's
 14 privilege, I instruct the witness not to answer.
 15 Otherwise, he may do so.

16 THE WITNESS: I -- on the advice of my
 17 attorney, I decline to answer.

18 BY MR. SCOLNICK:

19 Q. Mr. Rapp, if you knew that John Barrowman was
 20 actually a 19-year-old man in 1986, would you have
 21 included these details claiming that he was a
 22 17-year-old boy in your story?

23 MR. JASSY: Objection. Lacks foundation.
 24 Misstates prior testimony. Best Evidence Rule.

25 To the extent it calls for -- and

00178

1 argumentative.

2 To the extent it calls for disclosure of
 3 unpublished information, instruct the witness not to
 4 answer on the basis of reporter's privilege and the
 5 reporter's shield. Otherwise, he may do so.

6 THE WITNESS: On the advice of my attorney, I
 7 decline to answer.

8 BY MR. SCOLNICK:

9 Q. Do you think it's important -- how about this.
 10 Did you think in 2017 that it was important that you get
 11 the age of Mr. Rapp's friend, as you referred to in the
 12 story, correct before going to print?

13 MR. JASSY: Objection.

14 To the extent it calls for the disclosure of
 15 unpublished information protected from the disclosure by
 16 the reporter's shield and reporter's privilege, instruct
 17 the witness not to answer. Otherwise, he may do so.

18 And I'll also object that it lacks foundation
 19 and it's argumentative.

20 THE WITNESS: On the advice of my attorney, I
 21 decline to answer.

27. Page 179, Lines 13 to 20

13 Q. Okay. So, Mr. Vary, if you knew that John
 14 Barrowman was actually 19 -- a 19-year-old man in 1986,
 15 would you have included the details in your story that

1 16 he was only a 17-year-old boy?

2 17 MR. JASSY: Same objections and same
3 18 instructions as the last question.

4 19 THE WITNESS: On advice of my attorney, I am
5 20 declining to answer that question.

6 28. Page 180, Line 8 to Page 181, Line 16

7 8 Q. Has anyone told you, after publishing this
8 9 article, that Mr. Barrowman was actually 19 years old in
9 10 1986?

10 11 MR. JASSY: Objection.

11 12 To the extent it calls for disclosure of
12 13 unpublished information, instruct the witness not to
13 14 answer on the grounds of reporter's privilege and the
14 15 reporter's shield. Otherwise, he may do so.

15 16 THE WITNESS: On the advice of my attorney, I
16 17 am declining to answer that question.

17 18 MR. JASSY: I assume you mean other than you,
18 19 Chase, in your representations in this deposition;
19 20 right?

20 21 MR. SCOLNICK: Thank you. Yes.

21 22 BY MR. SCOLNICK:

22 23 Q. Other than me today, has anyone told you, after
23 24 publishing this article -- or at any time that
24 25 Mr. Barrowman was actually a 19-year-old man in 1986?

25 00181

26 1 MR. JASSY: Same objection. Same instruction.

27 2 THE WITNESS: On the advice of my attorney, I'm
28 3 declining to answer that question.

1 4 BY MR. SCOLNICK:

2 5 Q. If you would have known at the time of
3 6 publishing this article that Mr. Barrowman was a
4 7 19-year-old man and not a 17-year-old boy, would you
5 8 still have published the details as you did and included
6 9 in the story?

7 10 MR. JASSY: Objection. Calls for speculation.
8 11 Lacks foundation.

9 12 To the extent that it calls for the disclosure
10 13 of unpublished information, instruct the witness not to
11 14 answer. Otherwise, he may do so.

12 15 THE WITNESS: Advice of my attorney, I'm
13 16 declining to answer this question.

29. Page 182, Line 14 to Page 184, Line 1

14 Q. In the approximately three weeks between
15 Mr. Rapp first telling you his story and you publishing
16 it, what, if any, attempts did you make to reach out to
17 Mr. Barrowman and ask him to corroborate or contradict
18 Mr. Rapp's account?

19 MR. JASSY: Objection.

20 To the extent it calls for the disclosure of
21 unpublished information, instruct the witness not to
22 answer on the basis of the reporter's privilege and the
23 reporter's shield. Otherwise, he may answer.

24 THE WITNESS: The advice of my attorney, I'm
25 declining to answer that question.

00183

1 BY MR. SCOLNICK:

2 Q. Did you think Mr. Fowler deserved, before you
3 publishing this story, in that three-week period of
4 time, that you go out and attempt to verify what
5 Mr. Rapp was telling you by contacting a percipient
6 witness from 1986?

7 MR. JASSY: Objection. Lacks foundation.
8 Argumentative.

9 To the extent it calls for the disclosure of
10 unpublished information, instruct the witness not to
11 answer on the grounds of the reporter's privilege and
12 the reporter's shield. Otherwise, he may answer.

13 THE WITNESS: On the advice of my attorney, I
14 am declining to answer that question.

15 BY MR. SCOLNICK:

16 Q. What, if any, attempts did you make to
17 interview Mr. Barrowman before you published this story
18 with Mr. Rapp's allegations?

19 MR. JASSY: Objection. Asked and answered. To
20 the extent it calls for disclosure of unpublished
21 information protected from disclosure by the attorney --
22 excuse me -- by the reporter's shield or the reporter's
23 privilege, I instruct the witness not to answer.
24 Otherwise, he may answer.

25 THE WITNESS: On the advice of my attorney, I'm

00184

1 declining to answer that question.

1 30. Page 184, Line 17 to Page 185, Line 13

2 17 Has anyone informed you that Mr. Barrowman has
3 18 been deposed in this case?

4 19 MR. JASSY: Objection.

5 20 To the extent it calls for disclosure of
6 21 attorney-client privileged communications, I instruct
7 22 the witness not to answer.

8 23 THE WITNESS: On the advice of my attorney, I'm
9 24 not responding to that question.

10 25 ///

11 00185

12 1 BY MR. SCOLNICK:

13 2 Q. Has anyone informed you that Mr. Barrowman
14 3 denies sitting in a VIP area with Mr. Rapp and
15 4 Mr. Fowler at the Limelight in 1986?

16 5 MR. JASSY: Objection.

17 6 To the extent it calls for the disclosure of
18 7 attorney-client privileged communications or unpublished
19 8 information obtained in the course of news-gathering,
20 9 instruct the witness not to answer on the grounds of the
21 10 reporter's privilege and the reporter's shield.

22 11 Otherwise, he can answer.

23 12 THE WITNESS: On the advice of my attorney, I'm
24 13 declining to answer that question.

25 31. Page 188, Lines 7 to 16

26 7 Q. Did Mr. Rapp tell you that he had been to
27 8 Mr. Fowler's apartment more than once?

28 9 MR. JASSY: Objection.

1 10 To the extent it calls for disclosure of
2 11 unpublished information, I object based on the
3 12 attorney -- excuse me -- the -- the reporter's privilege
4 13 and the reporter's shield and instruct with the witness
5 14 not to answer. Otherwise, he may.

6 15 THE WITNESS: On the advice of my attorney, I'm
7 16 not responding to that question.

8 32. Page 188, Line 25 to Page 189, Line 9

9 25 Q. Did Mr. Rapp tell you that he and John

00189

1 Barrowman and Mr. Fowler went back to Mr. Fowler's
2 studio apartment after the Limelight?

3 MR. JASSY: Objection.

4 To the extent it calls for the disclosure of
5 unpublished information, instruct the witness not to
6 answer based on the reporter's privilege and the
7 reporter's shield. And otherwise, he may do so.

8 THE WITNESS: On the advice of my attorney, I'm
9 not responding to that question.

33. Page 199, Line 20 to Page 200, Line 7

20 Q. What about getting a floor plan of the
21 apartment? Is that something you're able to do in -- in
22 2017, when you were told by Mr. Rapp that Mr. Fowler's
23 apartment had a bedroom?

24 MR. JASSY: Objection. Calls for speculation.
25 Lacks foundation. And to the extent that it calls for

00200

1 the disclosure of -- of unpublished information or
2 news-gathering information, object on the reporter's
3 privilege and the reporter's shield.

4 Instruct the witness not to answer. But he
5 may, if he's able to.

6 THE WITNESS: On the advice of my attorney, I
7 am declining to respond to that question.

34. Page 200, Line 22 to Page 201, Line 10

22 Q. I think to clarify that last question, let me
23 ask it again.

24 If you would have known in October of 2017 that
25 Mr. Fowler's apartment in 1986 did not -- did not have a

00201

1 bedroom, would you have still published this story?

2 MR. JASSY: Objection. Calls for speculation.
3 Incomplete hypothetical. Lacks foundation. And to the
4 extent that it calls for disclosure of unpublished
5 information, I object on the basis of a reporter's
6 privilege and the reporter's shield.

7 Instruct the witness not to answer. Otherwise,

1 8 he may answer the question.
 2 9 THE WITNESS: On the advice of my attorney, I'm
 3 10 declining to respond to that question.

4 35. Page 202, Lines 11 to 20

5 11 Q. Did Mr. Rapp identify any witnesses who could
 6 12 put him at this alleged party at Mr. Fowler's apartment?
 7 13 MR. JASSY: Objection.
 8 14 To the extent it calls for the disclosure of
 9 15 unpublished information, I object on the basis of the
 10 16 reporter's privilege and the reporter's shield and
 11 17 instruct the witness not to answer. But you may
 12 18 otherwise answer the question.
 13 19 THE WITNESS: On the advice of my attorney, I'm
 14 20 not responding to that question.

15 36. Page 203, Lines 9 to 19

16 9 Q. Did Mr. Rapp provide the description of any
 17 10 witness who allegedly saw him at a party at Mr. Fowler's
 18 11 apartment?
 19 12 MR. JASSY: Objection. To the extent it calls
 20 13 for the disclosure of unpublished information, object
 21 14 based on the reporter's privilege and the reporter's
 22 15 shield.
 23 16 Instruct the witness not to answer. Otherwise,
 24 17 he may answer the question.
 25 18 THE WITNESS: On the advice of my attorney, I'm
 26 19 not responding to that question.

27 37. Page 204, Line 22 to Page 205, Line 6

28 22 Q. And what details did she provide about
 29 23 Mr. Rapp's account that he allegedly told her in 1992?
 30 24 MR. JASSY: Objection.
 31 25 To the extent it calls for the disclosure of
 32 00205
 33 1 unpublished information, I instruct the witness not to
 34 2 answer on the basis of the reporter's privilege and the
 35 3 reporter's shield. Otherwise, he may answer the

4 question.

5 THE WITNESS: On advice of my attorney, I'm not
6 responding to that question.

38. Page 205, Line 19 to Page 206, Line 19

19 Q. Did you interview any witnesses who saw
20 Mr. Rapp interact with Mr. Fowler in 1986?

21 MR. JASSY: Objection.

22 To the extent it calls for the disclosure of
23 unpublished information, instruct the witness not to
24 answer on the basis for the reporter's privilege and the
25 reporter's shield. Otherwise, he may answer the

00206

1 question.

2 THE WITNESS: On the advice of my attorney, I'm
3 declining to respond to that question.

4 BY MR. SCOLNICK:

5 Q. Did you interview anyone who -- to whom
6 Mr. Rapp told his allegations at around the time of --
7 well, in the -- in 1986 or 1987 -- strike that. I can
8 ask the question a little bit cleaner.

9 Did you interview anyone who confirmed to you
10 that Mr. Rapp shared with them his allegations against
11 Mr. Fowler at or around the time that the allegations
12 allegedly occurred?

13 MR. JASSY: Objection. Vague.

14 To the extent that it calls for the disclosure
15 of information protected by the reporter's shield and
16 the reporter's privilege, I instruct the witness not to
17 answer. Otherwise, he may do so.

18 THE WITNESS: On the advice of my attorney, I'm
19 declining to respond to that question.

39. Page 207, Line 20 to Page 208, Line 4

20 Q. Did Mr. Rapp tell you what details Anthony
21 provided at this party?

22 MR. JASSY: Objection.

23 To the extent it calls for the disclosure of
24 unpublished information, instruct the witness not to
25 answer on the basis of the reporter's privilege and the

00208

1 reporter's shield. Otherwise, he may answer the
2 question.

3 THE WITNESS: On the advice of my attorney, I'm
4 declining to respond to that question.

5
6 40. Page 209, Lines 11 to 21

7 11 Q. Well, Mr. Rapp's telling you here in writing
8 12 that it was John Barrowman that went to the Limelight
9 13 with Mr. Fowler and Mr. Rapp; right?

10 14 MR. JASSY: Objection.

11 15 To the extent that it's asking for the
12 16 disclosure of unpublished information protected from
13 17 disclosure by the reporter's shield and reporter's
14 18 privilege, instruct the witness not to answer.

15 19 Otherwise, he can answer the question.

16 20 THE WITNESS: On the advice of my attorney, I'm
17 21 not responding to that question.

18
19 41. Page 210, Lines 11 to 21

20 11 Q. Mr. Vary, did Mr. Rapp ever tell you that you
21 12 shouldn't share the details of what he told you about
22 13 his interactions with Mr. Fowler and Mr. Barrowman?

23 14 MR. JASSY: Objection. Lacks foundation. And
24 15 to the extent it calls for the disclosure of unpublished
25 16 information, object on the basis of the reporter's
26 17 shield and the reporter's privilege.

27 18 Instruct the witness not to answer, unless he's
28 19 otherwise able to do so.

29 20 THE WITNESS: On the advice of my attorney, I
30 21 am declining to respond to that question.

31
32 42. Page 213, Lines 4 to 14

33 4 Q. At no point did Mr. Rapp tell you he had
34 5 trouble remembering the details of his allegations, did
35 6 he?

36 7 MR. JASSY: Objection. Lacks foundation.
37 8 And to the extent it's asking for unpublished

1 9 information -- I'm not sure that it is; but if it is, I
 2 10 instruct the witness not to answer on the basis of the
 3 11 reporter's shield and reporter's privilege. But
 4 12 otherwise, he can answer the question, if he's able.
 5 13 THE WITNESS: No. On the advice of my
 6 14 attorney, I am declining to respond to that question.

7 43. Page 213, Line 16 to Page 215, Line 2

8 16 Q. Looking at the top of Page 46. I asked you
 9 17 earlier about Mr. Rapp's statement, "He didn't tell the
 10 18 rest of the story, though." When I asked you what you
 11 19 meant by that, you said the rest of the story that
 12 20 appears in the article. So I'm trying to figure out
 13 21 here what you believe Mr. Barrowman knew about the rest
 14 22 of -- I'm sorry. Strike that.

15 23 I'm trying to figure out what you believe
 16 24 Mr. Barrowman knew beyond what appears in the -- in the
 17 25 -- in the prior sentence, which is that Mr. Barrowman

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1 1 went to the Limelight with Mr. Rapp and Mr. Fowler.

2 2 What beyond that was the rest of the story?

3 3 MR. JASSY: Objection. Compound. And
 4 4 misleading. Misstates prior testimony. Lacks
 5 5 foundation. And to the extent it calls for the
 6 6 disclosure of unpublished information, I object on the
 7 7 basis of the reporter's shield and reporter's privilege.

8 8 Instruct the witness not to answer. Otherwise,
 9 9 he may do so.

10 10 THE WITNESS: On the advice of my attorney, I'm
 11 11 declining to respond to that question.

12 12 BY MR. SCOLNICK:

13 13 Q. Let me ask the question more cleanly.

14 14 What else did Mr. Rapp tell you about his
 15 15 interactions with Mr. Barrowman and Mr. Fowler?

16 16 MR. JASSY: Objection. Lacks foundation. And
 17 17 to the extent that it calls for the disclosure of
 18 18 unpublished information, which I think it does, the
 19 19 objection is based on the reporter's shield, the
 20 20 reporter's privilege.

21 21 And I instruct the witness not to answer,
 22 22 unless he's otherwise able.

23 23 MR. SAGHIR: Objection. No foundation.

1 24 MR. JASSY: Sorry. I thought I said that one
2 25 too. I join in that.

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4 1 THE WITNESS: On the advice of my attorney, I'm
5 2 declining to respond to that question.

6 44. Page 217, Line 11 to Page 221, Line 12

7 11 Q. What are the details about the party that you
8 12 steered away from in your article?

9 13 MR. SAGHIR: Objection. Assumes facts not in
10 14 evidence. Argumentative. No foundation.

11 15 MR. JASSY: Join in all those objections.

12 16 And to the extent that it calls for the
13 17 disclosure of unpublished information, instruct the
14 18 witness not to answer on the basis of the reporter's
15 19 shield and the reporter's privilege. And -- otherwise,
16 20 he's free to answer the question.

17 21 THE WITNESS: On the basis on the advice of my
18 22 attorney, I'm -- I'm electing not to respond to that
19 23 question. I will, I believe, refer to earlier testimony
20 24 I gave in which I indicated that Anthony's best
21 25 recollection -- you know, what -- what -- what Anthony

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23 1 told me about the party is what is published.

24 2 BY MR. SCOLNICK:

25 3 Q. Are you willing to tell me any details about
26 4 what Mr. Rapp told you about his version of events
27 5 outside of what you published in your -- in your
28 6 story -- in your article?

29 7 MR. SAGHIR: Objection. No foundation.

30 8 MR. JASSY: Join in that objection.

31 9 THE WITNESS: I would just reiterate the
32 10 objections that my attorney's been making as far as the
33 11 reporter's shield law. I am here to talk about what was
34 12 published in the story.

35 13 BY MR. SCOLNICK:

36 14 Q. So is that -- I just want to make sure the
37 15 record's clear. Are you refusing to answer based on
38 16 your attorney's objection for the reporter's shield law
39 17 statements that Mr. Rapp has made to you that were
40 18 unpublished?

41 19 MR. SAGHIR: Objection. Lacks foundation.

1 20 MR. JASSY: It lacks foundation. And I think I
 2 21 know what you're getting at -- but the -- I'm still
 3 22 going to raise the objection that it call -- to the
 4 23 extent that it calls for the disclosure of unpublished
 5 24 information, I would instruct the witness not to answer
 6 25 on the basis of the shield and the privilege --

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1 reporter's shield and reporter's privilege. Otherwise,
 2 he can answer the question.

3 THE WITNESS: I am following the best advice of
 4 my attorney to decline to respond to questions about
 5 unpublished material.

6 BY MR. SCOLNICK:

7 Q. Okay. Did you make an audio recording of any
 8 of your interviews with Mr. Rapp?

9 MR. JASSY: Objection.

10 To the extent that it calls for the disclosure
 11 of news-gathering techniques protected from disclosure
 12 by the reporter's privilege and the reporter's shield, I
 13 instruct the witness not to answer on the grounds -- the
 14 reporter's privilege and reporter's shield. Otherwise,
 15 if he can answer the question, he may.

16 THE WITNESS: In the best advice of my
 17 attorney, I'm declining to respond to that question.

18 BY MR. SCOLNICK:

19 Q. Did you take notes during any of your
 20 interviews with Mr. Rapp?

21 MR. JASSY: Objection.

22 To the extent that it calls for the disclosure
 23 of news-gathering information that's unpublished, which
 24 it does, instruct the witness not to answer on the basis
 25 of the reporter's shield and reporter's privilege.

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1 Otherwise, he can answer the question.

2 THE WITNESS: The advice of my attorney, I'm
 3 declining to respond to that question.

4 BY MR. SCOLNICK:

5 Q. Did Mr. Rapp tell you how many people were at
 6 the party -- the alleged party at Mr. Fowler's house?

7 MR. JASSY: Objection.

8 To the extent calls for the disclosure
 9 unpublished information, instruct the witness not to
 10 answer on the basis of the reporter's shield and the
 11 reporter's privilege. Otherwise, he can answer the

1 12 question.
 2 13 THE WITNESS: On the advice of my attorney, I'm
 3 14 declining to respond to that question.
 4 15 BY MR. SCOLNICK:
 5 16 Q. Did Mr. Rapp refer to the event that allegedly
 6 17 occurred at Mr. Fowler's house as a gathering or a party
 7 18 or some other word?
 8 19 MR. JASSY: Objection.
 9 20 To the extent it calls for disclosure of
 10 21 unpublished information, I instruct the witness not to
 11 22 answer on the grounds of the reporter's privilege and
 12 23 the reporter's shield. Otherwise, he can answer the
 13 24 question.
 14 25 THE WITNESS: On the advice of my attorney, I'm
 15 00221
 16 1 declining to respond to that question.
 17 2 BY MR. SCOLNICK:
 18 3 Q. Did Mr. Rapp tell you whether Mr. Fowler had a
 19 4 dog at his apartment?
 20 5 MR. JASSY: Objection. Calls for the
 21 6 disclosure -- to the extent that it calls for the
 22 7 disclosure of unpublished information, instruct the
 23 8 witness not to answer on the basis of the reporter's
 24 9 shield and the reporter's privilege. Otherwise, he can
 25 10 answer the question.
 26 11 THE WITNESS: On the advice of my attorney, I'm
 27 12 declining to respond to that question.

19
 20 45. Page 228, Line 24 to Page 229, Line 13

21 24 Q. Did you speak with Mr. Dawes, or did someone
 22 25 else on your team?
 23 00229
 24 1 MR. JASSY: To the extent it calls for the
 25 2 disclosure of news-gathering information that's not
 26 3 published, instruct the witness not to answer on the
 27 4 grounds of the reporter's shield and the reporter's
 28 5 privilege. Otherwise, he can answer the question.
 6 THE WITNESS: This is not a section of the
 7 article that I authored.
 8 BY MR. SCOLNICK:
 9 Q. To your recollection, have you ever
 10 communicated with Mr. Dawes?

1 11 MR. JASSY: Objection. Same instruction.
 2 12 THE WITNESS: On the advice of my attorney, I'm
 3 13 not responding to that question.

4 46. Page 230, Line 17 to Page 231, Line 1

5 17 Q. What, if any, investigation did you conduct
 6 18 regarding Mr. Dawes's allegations against Mr. Fowler?

7 19 MR. JASSY: Objection. Asked and answered.

8 20 And to the extent that it calls for the
 9 21 disclosure of information protected from disclosure by
 10 22 the reporter's shield and the reporter's privilege,
 11 23 instruct the witness not to answer. But otherwise, he
 12 24 may.

11 25 THE WITNESS: On the advice of my attorney, I'm
 00231

12 1 declining to respond to that question.

14 47. Page 275, Line 14 to Page 276, Line 17

15 14 Q. Why did you not inform your readers that you
 16 15 informed Mr. Fowler's camp for the first time of the
 17 16 nature of the allegations and identity of the accuser
 18 17 just hours before the article was published?

18 18 MR. JASSY: Objection. Lacks foundation.

19 19 And to the extent it calls for the disclosure
 20 20 of news-gathering information or unpublished information
 21 21 that is protected from disclosure by the reporter's
 22 22 privilege or the reporter's shield, I instruct the
 23 23 witness not to answer. But otherwise, he can do so, if
 24 24 he's able.

22 25 THE WITNESS: On the advice of my attorney, I
 23 00276

24 1 am not responding to that question.

25 2 BY MR. SCOLNICK:

26 3 Q. Did you think it was important for the public
 27 4 to know that you reached out to Mr. Fowler's camp and
 28 5 informed them of the allegations and the identity of the
 6 6 accuser hours before the story was published?

7 7 MR. JASSY: Objection.

8 8 To the extent that it calls for the disclosure
 9 9 of information that is protected from disclosure by the

10 reporter's privilege, Reporter's shield, instruct the
 11 witness not to answer. Otherwise, he can do so.

12 And I also object that it lacks foundation.

13 MR. SAGHIR: Join in the objection as to no
 14 foundation.

15 THE WITNESS: Based on my best -- based on
 16 advice of my attorney, I am declining to respond to that
 17 question.

7 **B. Moving Party Mr. Fowler's Statement**

8 Mr. Vary's counsel's deposition objections and instructions not to answer were
 9 made on two primary grounds. First, Mr. Vary objected that the subject of the questions
 10 was protected under a qualified "reporter's privilege" under the First Amendment.
 11 Second, Mr. Vary objected that California's "reporter's shield" provided protection that
 12 justified his refusal to provide this discovery. These objections have no merit.

13 The Court can and should find Mr. Vary to be in contempt and issue appropriate
 14 sanctions unless Mr. Vary provides a complete production of documents and sits for a
 15 supplemental deposition within five (5) business days of the Court's order on this motion
 16 to answer the questions he refused to answer at the first session of his deposition plus all
 17 reasonable follow-up questions. *See, e.g.,* Fed. R. Civ. P. 45(g) (stating district court
 18 "where compliance is required . . . may hold in contempt a person who, having been
 19 served, fails without adequate excuse to obey [a] subpoena or an order related to it").

20 **1. Mr. Vary's Objections Based On Qualified Protection Under** 21 **the First Amendment Are Without Merit**

22 Mr. Vary first argues the First Amendment provides qualified protection for his
 23 "newsgathering activities." He relies on the Ninth Circuit's opinion in *Shoen v. Shoen*,
 24 5 F.3d 1289 (9th Cir. 1993) for his broad assertion that First Amendment justifies his
 25 blanket objection under these circumstances.

26 As an initial matter, Mr. Vary has failed to demonstrate the questions he refused
 27 to answer concern his protected newsgathering. While Mr. Vary wrote an article on
 28 Rapp's allegations against Mr. Fowler in October 2017 and a follow-up article a year

1 later in 2018, Mr. Vary has known Rapp for over two decades. Mr. Vary acknowledges
2 he and Rapp are friends and remain friends. *See* Scolnick Decl., Ex. 1 (Vary Depo. RT
3 at 58:21-25, 60:17-18, 66:3-7). Mr. Vary cannot use a qualified privilege under the First
4 Amendment to broadly protect all of his communications with Rapp other than what he
5 explicitly included in his two articles.

6 Further, the First Amendment protection – even when broadly interpreted – applies
7 to a reporter’s “source materials.” *Schoen*, 5 F.3d at 1295. Here, Mr. Vary refused to
8 answer many questions at deposition about his own thought processes and actions in
9 preparing articles about Rapp’s allegations against Mr. Fowler. *See, e.g., Dillon v. City*
10 *and County of San Francisco*, 748 F.Supp. 722, 726 (N. D. Cal. 1990) (finding non-party
11 could be compelled to testify about personal observations). Such information is relevant
12 and important because Rapp likely will attempt to present evidence at trial about the
13 BuzzFeed article that contains the allegations upon which his claims are based. Rapp
14 likely will attempt to claim the account contained in the BuzzFeed article is consistent
15 with that given at his deposition and at trial. But the evidence suggests Rapp made
16 various statements to Mr. Vary inconsistent with the version of events about which he
17 testified at deposition.

18 Throughout discovery, Rapp also has mischaracterized Mr. Fowler’s response to
19 Mr. Vary’s request for comment on his BuzzFeed article. Mr. Vary’s text exchanges with
20 Rapp demonstrate Mr. Vary concealed material inconsistencies in Rapp’s account and
21 misrepresented material facts when seeking Mr. Fowler’s comment. By his own
22 admission in text exchanges with Rapp, Mr. Vary changed Rapp’s account to deprive
23 Mr. Fowler of a fair and adequate opportunity to respond to the demonstrably false details
24 of Rapp’s account. Evidence of Mr. Vary’s attempt to deceive Mr. Fowler and deprive
25 him of an opportunity to comment on the story—all in concert with Rapp—is essential
26 to Mr. Fowler’s defense and beyond the scope of legitimate journalistic activity protected
27 by the First Amendment.

28

1 Further, Mr. Vary has not and cannot show he did not affirmatively waive the
2 protection he now asserts. Importantly, some of the unpublished communications
3 between Mr. Vary and Rapp – or at least some of their text message communicated –
4 previously were produced in this case by Rapp, with Mr. Vary’s knowledge and implicit
5 consent. More specifically, Mr. Vary testified he was informed by Rapp’s lawyers in
6 early 2021 that Rapp intended to produce various text messages between Rapp and Mr.
7 Vary, including back-and-forth between them leading to the finalization and publication
8 of Mr. Vary’s BuzzFeed article. *See* Scolnick Decl., Ex. 1 (Vary Depo. Tr.) at 12:19-
9 13:7, 14:24-15:4, 28:16-23.) Mr. Vary was told those communications would be
10 produced, and he interjected no objection at that time. To the extent he had any valid
11 objection, he waived it by not taking action at that time, knowing that unpublished
12 materials would be disclosed. *See, e.g., United States v. Bahe*, 128 F.3d 1440, 1442 (10th
13 Cir. 1997). But, at his deposition, Mr. Vary refused to answer any question about his
14 unpublished communications with Rapp.

15 The produced text messages suggested there were glaring inconsistencies with the
16 story Rapp initially told Mr. Vary with what ultimately was published in the BuzzFeed
17 article. For example, Rapp stated in the text message he last saw Mr. Fowler in 2008 at
18 the Tony Awards, but that was proven to be impossible. *See, e.g., Scolnick Decl., Ex. 1*
19 (Vary Depo RT) at 119:15-122:7. But this inconsistency was corrected in Mr. Vary’s
20 published story with no acknowledgement or disclosure in the article that Rapp had stated
21 it incorrectly. *Id.* at 167:2-20. Likewise, the text messages produced by Rapp show he
22 disclosed his visiting friend during the time of the alleged incident was an actor named
23 John Barrowman. Although Barrowman’s age is easily verifiable and reveals he was 19
24 years old at the time of the alleged incident, Mr. Vary’s story makes the demonstrably
25 false claim that Rapp’s unnamed friend was a “17 year-old boy” in 1986. But Mr. Vary
26 refused to answer questions about this. *Id.* at 174:9-18, 177:7-181:16.

27 Besides lacking justification to withhold even the “source materials” contemplated
28 by the protection, the jury also must be permitted to understand the circumstances of how

1 it was prepared and published – *e.g.*, the extent of Mr. Vary’s investigation, the degree
2 to which the article’s content adequately conveyed his understanding, and his personal
3 biases. Without that context, the jury will be misled and confused about the veracity of
4 the BuzzFeed article’s assertions and could mistakenly believe it was thoroughly
5 investigated or prepared in good faith.

6 Even if the First Amendment could be properly invoked and has not been waived,
7 the protection is qualified, not absolute. The First Amendment protection must be set
8 aside, and discovery must be allowed, where the requested material is “(1) unavailable
9 despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3)
10 clearly relevant to an important issue in the case.” *See Mark v. Shoen*, 48 F.3d 412, 416
11 (9th Cir. 1995).

12 These factors are present here. Mr. Fowler already deposed Rapp, including about
13 his conversations with Mr. Vary. Rapp claimed he withheld no details he had with Mr.
14 Vary but Rapp could not recall specifics of each discussion he had with Vary. *See, e.g.*,
15 Scolnick Decl., Ex. 8 (Rapp Depo. RT at 9:5-10:7, 260:18-263:22, 269:13-270:7). Nor
16 did Rapp provide any specific details in his following interrogatory responses. *Id.*, Ex.
17 9 (Excerpts from Rapp’s 8/9/21 Interrogatory Responses). More specifically, Rapp
18 stated he did “not recall the exact words [he] used” in discussing his allegations with Mr.
19 Vary. *Id.* He stated he provided “additional details of the abuse” but was “unable to
20 state with certainty what more details [he] provided.” *Id.* But text messages produced
21 by Rapp and other documents show that Rapp told Mr. Vary a series of inconsistent
22 details, including the alleged date of his last time seeing Mr. Fowler, his assertion that
23 the incident occurred in a nonexistent bedroom in Mr. Fowler’s apartment, and the age
24 of Mr. Rapp’s friend who had accompanied him at a club with Mr. Fowler a few days
25 before the alleged incident. The evidence of Rapp’s statements to Mr. Vary in the weeks
26 before Rapp’s claims first became public cannot be obtained elsewhere. Further, Mr.
27 Fowler clarified during the meet and confer conference that he is not seeking the
28 disclosure of information from confidential sources, but Rapp and the others identified

1 in BuzzFeed article) were not and are confidential sources.

2 The details of Rapp's discussions with Mr. Vary likewise are not cumulative and
3 are clearly relevant to an important issue. Rapp's credibility will be a critical issue at
4 trial. Rapp voluntarily sought out the *Buzzfeed* article with a friendly writer who would
5 sanitize the story by omitting inconsistent and demonstrably false details. The *Buzzfeed*
6 article publicly disclosed Rapp's allegations for the first time, many decades after the
7 alleged incident. The widespread publicity of that *Buzzfeed* article concealed Rapp's
8 false account. Rapp's unpublished statements to Mr. Vary – rather the manicured and
9 incomplete end result – are critical to examining Rapp's credibility and the veracity of
10 his claims.

11
12 **2. Mr. Vary's Objections Based on California's Reporter's Shield**
13 **Law Do Not Justify His Withholding of Discovery, Nor Has He**
Shown California's Shield Law Applies Here.

14 Besides the purported protections of the First Amendment under these
15 circumstances, Mr. Vary also claims that California's "reporter's shield" law applies to
16 this discovery dispute and provides absolute protection justifying Mr. Vary's
17 withholding of documents and refusal to answer questions at deposition. Vary wrongly
18 presumes California law applies to this discovery dispute. Under Evidence Code section
19 501, "with respect to an element of a claim or defense as to which State law supplies the
20 rule of decision, the privilege of a witness . . . shall be determined in accordance with
21 State law." Fed. R. Evid. 501. As an initial matter, Under Federal Rule of Civil
22 Procedure 45(f), this Court can and should transfer this discovery dispute to the Southern
23 District of New York where this action is pending. In this diversity action, New York
24 state law provides the substantive source of law for Rapp's claims.

25 But even if the Court heard this dispute, and applied California's choice of law
26 rules, the result should be application of New York state law. Under California's
27 "governmental interest" choice of law analysis, the Court is to examine the policies
28 underlying the laws of the states involved to determine which state is more "interested"

1 in having its law applied. Here, the lawsuit is pending in New York and will be decided
2 under New York law. The primary source of Vary's *Buzzfeed* article was Rapp, who is
3 a New York citizen and appears to have been in New York at the time he spoke with
4 Vary about the substance for the *Buzzfeed* article. While Mr. Vary is located in Los
5 Angeles, *Buzzfeed* – the media outlet which published the article and is likely the owner
6 of any unpublished materials– is based in New York City. *See, e.g.,*
7 <https://www.buzzfeed.com/about/contact>.

8 New York's reporters' shield law was codified in New York Civil Rights Law §
9 79-h, and represents an important public policy for the state. *See, e.g., In re Beach v.*
10 *Shanley*, 62 N.Y.2d 241, 255 (1984). If any shield law applies, it should be that of New
11 York state.

12 New York's reporters' shield provides only qualified protection for non-
13 confidential sources and information. The test requires a court to weigh the competing
14 interests, similar to the First Amendment analysis above. Under New York law, the
15 reporter's shield can be overcome where the party seeking disclosure shows the
16 information (1) is highly material and relevant, (2) is critical or necessary to the
17 maintenance of a party's claim, defense, or proof of an issue material thereto; and (3) is
18 not obtainable from any alternative source. *See, e.g., O'Neill v. Oakgrove Const., Inc.,*
19 *71 N.Y.2d 521, 527 (1988)*. Each of these factors is present here. Rapp's credibility
20 and the details of the alleged incident lie at the heart of this case. Rapp's statements to
21 Mr. Vary provide critical evidence bearing on the veracity of Rapp's claim, and such
22 evidence cannot be obtained elsewhere.

23 Finally, even if the Court applied a choice of law analysis that determined
24 California law should apply, Mr. Vary still should have to provide the required
25 information. Under California law, the state's reporter's shield law must be balanced
26 against a criminal defendant's constitutional right to a fair trial. *See Delaney v. Superior*
27 *Court*, 50 Cal.3d 785, 805-806 (1990). The California reporter's shield may be set aside
28 where the criminal defense shows there is a reasonable possibility the withheld

information would materially assist the defense. *Id.* at 807-813. While this is not a criminal case, similar considerations should apply because Rapp's claims are premised on his allegation that Mr. Fowler committed a crime. Rapp's claims were asserted under New York's Child Victims Act which resuscitated certain civil claims but only where the conduct at issue would constitute a "sexual offense" as defined in section 130 of New York's Penal Law. *See* N.Y. CLPR § 214-g. Rapp should not be permitted to pursue civil claims against Mr. Fowler that rely on showing a criminal offense, while Mr. Fowler is shielded from critical evidence that could undermine those claims.

3. Vary's Other Objections Are Without Merit.

During the meet and confer process, Mr. Vary also raised other miscellaneous objections, none of which have merit. Mr. Vary claimed the deposition subpoena was deficient because it was issued under letterhead from this Court, rather than the Southern District of New York. But Mr. Vary voluntarily appeared for deposition. If he wished to stand on any perceived defect in the subpoena, he was required to bring a motion to quash under Federal Rule of Civil Procedure 45. Mr. Vary did not move to quash or modify the subpoena and therefore waived these technical objections. *See, e.g., BNSF Ry. Co. v. Alere, Inc.*, 2018 U.S. Dist. LEXIS 83559, *13 (S.D. Cal. May 17, 2018) (failure to bring motion to quash waived objection based on geographic limit of subpoena). He cannot appear for deposition but then refuse to answer questions based on an alleged defect in the subpoena that commanded his testimony.

Likewise, Mr. Vary's counsel's various objections on foundation are absurd, as his objections often were made to the very questions that sought to elicit foundational details. Had Mr. Vary been allowed to answer, any missing foundation would have been supplied.

C. **Responding Party Vary's Statement:**

1. Fowler's Entire Motion Is Untimely.

As shown by the caption page and the first paragraph of Fowler's introductory statement above, the discovery cut-off in this case was January 18, 2022 and the trial

1 ready date is February 18, 2022. Fowler brings this untimely motion to compel against
 2 a third-party reporter after the close of discovery and mere days before the case is set to
 3 go to trial.

4 “Untimeliness is sufficient ground, standing alone, to deny a discovery
 5 motion.” *Wyles v. Sussman*, 445 F. Supp. 3d 751, 755 (C.D. Cal. 2020) (quoting *Williams*
 6 *v. Las Vegas Metro. Police Dep’t*, 2015 WL 3489553, at *1 (D. Nev. June 3, 2015)).
 7 Motions to compel filed after the close of discovery “are usually denied.” *Id.* (citing
 8 *Aardwolf Indus., LLC v. Abaco Machines USA, Inc.*, 2017 WL 10339007, at *2 (C.D.
 9 Cal. Aug. 9, 2017)). As a general rule in this District, discovery motions must be brought
 10 within “sufficient time for decision within the strictures of the District Judge’s scheduling
 11 order.” *See, e.g.*, Honorable Patricia Donahue,³ *Judge’s Procedures: 2. Discovery*
 12 *Motions*, <https://www.cacd.uscourts.gov/honorable-patricia-donahue>. The presiding
 13 District Judge in the underlying litigation orders the parties to be “ready for trial” starting
 14 on the date of the final pretrial filings, which are set for February 18, 2022. *See Anthony*
 15 *Rapp v. Kevin Spacey Fowler*, No. 20-cv-09586-LHK, Dkt. 118 (S.D.N.Y. Oct. 18, 2021)
 16 (Scheduling Order).⁴ By noticing a hearing for *after* the dispositive motion deadline and
 17 the final pretrial filing deadlines in the underlying litigation, Fowler risks interfering with
 18 the merits phase of the case. Fowler’s present motion is untimely.

19 Fowler’s lack of diligence is the source of delay here. Adam Vary, the third-party
 20 reporter, sat for an over seven-hour deposition on December 16, 2021 after being served
 21 the second of two deposition subpoenas on December 6, 2021. Jassy Decl. ¶¶ 4-5.
 22 During the deposition, and in letters dated November 18, 2021 and December 14, 2021,

23
 24 ³ While this matter has not yet been assigned a magistrate judge at the time of the
 25 exchange of this Joint Stipulation, given the procedural posture under Rule 45, Judge
 Patricia Donahue’s procedures provide guidance on how this District addresses untimely
 motions.

26 ⁴ Per Judge Kaplan’s scheduling order in the underlying civil litigation, the close
 27 of discovery was extended from October 1, 2021 to January 18, 2021, and final pretrial
 28 filing deadlines are now set for February 18, 2022. Fowler’s papers sent to Vary’s
 counsel failed to include “a copy of the order establishing the initial case schedule, as
 well as any amendments,” in violation of Local Rule 37-2.1.

1 Vary's counsel repeatedly advised Fowler's counsel that he would invoke the Reporter's
 2 Privilege/Shield in response to any questions about newsgathering and unpublished
 3 materials. Jassy Decl. ¶ 6. Fowler therefore had ample notice of Vary's positions and
 4 objections, yet he waited until weeks after the close of discovery to file this motion.

5 It is also noteworthy that Fowler waited until the final weeks of already-extended
 6 discovery deadlines to seek *any* discovery from Vary. If the discovery were as critical
 7 as Fowler now contends, he would have sought it before the first discovery cut-off in
 8 October 2021. *See* Scolnick Decl. ¶ 4 (first subpoena was issued to Vary on November
 9 4, 2021). Now, noticing a hearing for this motion to compel for *after* summary judgment
 10 and final pretrial filing deadlines in the underlying litigation, Fowler undermines any
 11 argument that such discovery is relevant, let alone necessary to support his defenses.
 12 Courts disfavor the "bad faith gamesmanship" of raising eleventh hour discovery
 13 disputes. *Cardoza v. Bloomin' Brands, Inc.*, 141 F. Supp. 3d 1137, 1141 (D. Nev. 2015).

14 **2. Fowler Did Not Comply with Local Rule 37-2.1.**

15 Local Rule 37-2.1 requires the parties to explain what they did to try to
 16 compromise on an issue or dispute. Fowler offered zero compromise on the deposition
 17 questions he now puts at issue. His only purported compromise was that he did not want
 18 to know the identities of any confidential sources, but that does not implicate any of the
 19 deposition questions at issue. Vary, on the other hand, did offer to compromise. Vary
 20 agreed to review his deposition transcript to determine what more he could provide that
 21 would not be protected from disclosure by the reporter's shield/privilege. Jassy Decl. ¶
 22 7. He also agreed to shorten the review period from 30 days to 20 days from the date he
 23 could access the transcript. *Id.* Fowler brings this motion before those 20 days have
 24 even expired. *Id.*

25 **3. Fowler's Motion Suffers Numerous Procedural Defects.**

26 Under the Federal Rules of Civil Procedure, Local Rules of the Central District
 27 of California, and individual procedures of several District Judges and Magistrate
 28 Judges of this District, Fowler's motion is defective on several other grounds. First, the

1 served notice of motion does not state before which judge, or in which courtroom, the
 2 motion will be heard and instead presumes a hearing date and time before seeking
 3 assignment to any judge in this District. Second, the Document Subpoena at issue was
 4 not properly served on Vary (counsel accepted service of the second records subpoena
 5 to Vary, but not the third Document Subpoena, which is the one at issue). Third, the
 6 Deposition Subpoena that Fowler seeks to enforce did not issue out of the court where
 7 the action is pending, in violation of FRCP 45(a)(2). Fourth, Fowler’s counsel did not
 8 comply with L.R. 37-1 because counsel’s letter did not: (a) identify “each” issue and/or
 9 discovery request in dispute, *see* Ex. 6; (b) specify the terms of the order sought—*e.g.*,
 10 no mention of seeking an order of contempt, *id.*; and (c) like this motion, Fowler
 11 provided almost no legal authority, and certainly nothing “dispositive.” Scolnick Decl.,
 12 Exs. 6 and 7 at 2. Fifth, Fowler did not comply with the court-mandated pre-motion
 13 discovery conference obligations specifically required by several judges in this District.

14 **4. Vary Only Declined to Answer Questions That Related to His**
 15 **Role as a Journalist.**

16 Vary only opted not to answer deposition questions where the questions called for
 17 privileged information. It is true that Vary and Rapp were friends before any articles
 18 concerning Rapp and Fowler were published, but, contrary to Fowler’s
 19 misrepresentations, Vary did *not* refuse to testify about his friendship with Rapp. Vary
 20 willingly answered questions about his connection to Rapp that were unrelated to Vary’s
 21 role as a journalist. *See, e.g.*, Jassy Decl., Ex. 11 at 38:6-22, 58:17-63:14, 64:8-16, 66:3-
 22 67:21. Vary also responded to questions about the general practices of journalists. *See,*
 23 *e.g.*, Jassy Decl., Ex. 11 at 39:24-40:3, 72:1-75:17, 103:10-104:13, 108:5-109:19.
 24 However, if a question potentially called for the disclosure of unpublished information
 25 related to Vary’s newsgathering and reporting on specific stories (*e.g.*, about Fowler),
 26 counsel objected and instructed (nearly always) “to the extent” that it called for such
 27 information, but also instructed that Vary could otherwise answer the question.
 28 Sometimes Vary determined that he could answer the question in whole or in part, and

1 sometimes he determined that he could not. Very frequently, Vary answered the question
 2 at least in part because he understood the instruction to only apply to unpublished
 3 information. *See, e.g.*, Jassy Decl., Ex. 11 at 26:11-20, 27:1-9, 30:13-20, 31:11-32:1,
 4 32:15-33:4, 47:6-18, 63:16-64:6, 64:20-65:6, 67:25-69:14, 116:20-117:9, 121:22-122:7,
 5 126:2-12, 129:8-134:24, 146:15-147:3, 156:19-157:10, 158:14-159:1, 160:24-161:10,
 6 168:10-23, 169:13-24, 170:18-171:18, 190:12-25, 193:3-194:8, 204:12-20, 208:17-
 7 209:2, 211:7-24, 212:13-213:2, 215:11-216:4, 222:16-223:4, 225:20-227:21, 228:24-
 8 229:7, 229:15-230:1, 242:20-243:11, 243:20-245:5. 249:9-250:13, 251:2-252:3. A
 9 thoughtful line was drawn, and it is inaccurate for Fowler to suggest anything to the
 10 contrary.

11 **5. California Law Applies and Shields Vary from Further**
 12 **Deposition Testimony.**

13 **a. California Law Provides Reporters Like Vary with**
 14 ***Absolute Protection in a Civil Case.***

15 In California, journalists are protected from having to disclose confidential
 16 sources and unpublished, non-confidential information as codified in the California
 17 Constitution, Art. 1, § 2(b) and California Evidence Code § 1070(a) (collectively,
 18 “California’s Shield Law”). California’s Shield Law protects journalists from having to
 19 “disclose *any* unpublished information obtained or prepared in gathering, receiving or
 20 processing of information for communication to the public.” Cal. Const., art. I, § 2(b)
 21 (emphasis added); *O’Grady v. Super. Ct.*, 139 Cal. App. 4th 1423, 1459-60 (2006)
 22 (applying California’s Shield Law to online journalists). Under California’s Shield Law,
 23 “unpublished information,” which is protected from disclosure in the face of a subpoena,
 24 includes *any* “information not disseminated to the public by the person from whom
 25 disclosure is sought, whether or not related information has been disseminated and
 26 includes, but is not limited to, all ... data of whatever sort not itself disseminated to the
 27 public through a medium of communication, whether or not published information based
 28 upon or related to such material has been disseminated.” *Id.*

1 California's Shield Law applies absolutely in civil cases, providing an "absolute
 2 immunity" from contempt in civil cases, and "'**absolute** protection to nonparty journalists
 3 in civil litigation from being compelled to disclose unpublished information[.]'" *New*
 4 *York Times Co. v. Superior Court*, 51 Cal. 3d 453, 456-57, 461-462 (1990) (emphasis
 5 added; quoting decision from Court of Appeal, which the Supreme Court affirmed); *see*
 6 *also McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 119-120 (2007) ("the Shield
 7 Law confers an absolute immunity against compelled disclosure of the protected
 8 information and, although that immunity must occasionally yield when it threatens to
 9 frustrate the competing federal constitutional right of a criminal defendant to a fair trial,
 10 there is no analogous competing right of a civil litigant that will suffice to overcome the
 11 immunity"). "Since contempt is generally the only effective remedy against a non-party
 12 witness, the California [Shield Law] grant[s] such witnesses virtually absolute
 13 protection" in civil cases. *Mitchell v. Superior Court*, 37 Cal. 3d 268, 274 (1984); *In re*
 14 *Willon*, 47 Cal. App. 4th 1080, 1091 (1996) (same).

15 Article 1, Section 2(b) of the California Constitution was enacted in 1980 by an
 16 overwhelming majority of California voters. By elevating the protection from a statute
 17 – Evidence Code § 1070 – to the state constitution, the California electorate demonstrated
 18 their belief in the need to give journalists the maximum possible shield for information
 19 obtained in their newsgathering activities. Recognizing this mandate, the Court of
 20 Appeal observed in *Playboy Enterprises, Inc. v. Superior Court*, 154 Cal. App. 3d 14,
 21 27-28 (1984), that the interests of the press are favored over having civil actions
 22 determined on a full record:

23 The elevation to constitutional status must be viewed as an
 24 intention to favor the interest of the press in confidentiality
 25 over the general and fundamental interest of the state in
 26 having civil actions determined upon a full development of
 27 material facts. . . . It has long been acknowledged that our
 28 state Constitution is the highest expression of the will of the
 people acting in their sovereign capacity as to matters of
 state law.

1 As the California Supreme Court explained in *Delaney v. Superior Court*, 50
 2 Cal. 3d 785 (1990), the Shield Law applies to **any** unpublished information, **even if it is**
 3 **not confidential**:

4 [Article 1, Section 2(b)] states plainly that a newsperson
 5 shall not be adjudged in contempt for ‘refusing to disclose
 6 any unpublished information’. . . . The use of the word ‘any’
 7 makes clear that article I, section 2(b) applies to all
 8 information, regardless of whether it was obtained in
 9 confidence. Words used in a constitutional provision
 ‘should be given the meaning they bear in ordinary use.’ . . .
 In the context of article I, section 2(b), the word ‘any’ means
 without limit and no matter what kind.

10 *Id.* at 798; *see also New York Times*, 51 Cal. 3d at 461-62 (unpublished photographs of
 11 a public event that photojournalist witnessed are protected by California’s Shield Law);
 12 *Miller v. Superior Court*, 21 Cal. 4th 883, 897 (1999) (“the shield law applies to
 13 unpublished information whether confidential or not”).

14 Where, as here, the material is sought by a civil litigant, there is no federal or state
 15 constitutional right that can be weighed against Mr. Vary’s rights under the California
 16 Constitution. As the court noted in *Playboy*: “[c]ivil litigants do not have a constitutional
 17 right to unrestricted discovery of relevant information.” 154 Cal. App. 3d at 25; *see also*
 18 *McGarry*, 154 Cal. App. 4th at 119-120 (same). Thus, in civil litigation, no balancing of
 19 opposing interests is appropriate because California’s Shield Law absolutely protects
 20 information from disclosure. *Id.*; *New York Times*, 51 Cal. 3d at 462 (a civil litigant has
 21 no federal or state constitutional rights which are sufficient to overcome rights under
 22 California Shield Law).

23 In *Los Angeles Memorial Coliseum Comm’n v. National Football League*, 89
 24 F.R.D. 489, 495 (C.D. Cal. 1981), the federal court granted journalists’ motions to quash
 25 subpoenas for their depositions and newsgathering materials, relying in part on
 26 California’s Shield Law, which, the court held, “‘reflects a paramount public interest in
 27 the maintenance of a vigorous, aggressive and independent press capable of participating
 28 in robust, unfettered debate over controversial matters, an interest which has always been

1 a principal concern of the First Amendment.”” *Id.* (quoting *Baker v. F&F Investment*,
2 470 F.2d 778, 782 (2d Cir. 1972)).

3 Under California’s Shield Law, Vary has an ***absolute*** constitutional right not to
4 disclose “***any*** unpublished information obtained or prepared in gathering, receiving or
5 processing of information” in this civil case, and Fowler has no competing constitutional
6 right that could overcome Vary’s rights. Cal. Const., art. I, § 2(b) (emphasis added);
7 *New York Times*, 51 Cal. 3d at 456-57, 461-462; *McGarry*, 154 Cal. App. 4th at 119-
8 120; *Playboy*, 154 Cal. App. 3d at 25. This absolute rule applies “whether or not
9 published information based upon or related to such material has been disseminated.”
10 Cal. Const., art. I, § 2(b).⁵

11 **b. Contrary to Fowler’s Contentions, California’s Shield**
12 **Law Applies Here, Not New York’s.**

13 ***i. Under Rule 45, the Laws of this Court Govern.***

14 California’s robust protections for reporters apply to this discovery dispute. Vary
15 is a third-party witness who resides and works in the Central District of California, and
16 has at all times relevant to this matter. Jassy Decl. ¶ 2; *id.*, Ex. 11 at 70:7-11, 77:17-
17 90:16, 90:2-93:22 (Vary work history). Any documents in his possession, custody, and
18 control are in the Central District of California. *Id.* Fowler served Vary with multiple
19 subpoenas under Federal Rule of Civil Procedure 45. Under Federal Rule of Civil
20 Procedure 45, motions to compel third-party discovery must be brought in the district
21
22
23
24

25 ⁵ Fowler makes a weak argument that, although this is civil litigation, applying
26 civil procedure, arising under civil claims of assault, battery, and intentional infliction of
27 emotional distress, he is somehow a criminal defendant even though he acknowledges
28 that “this is not a criminal case.” When Fowler’s counsel was asked in the meet and
confer process, “So if Fowler loses this civil case that would mean that he is a criminal?,”
his counsel candidly replied: “Of course not.” Jassy Decl. ¶ 8. Of course not. Fowler is
a civil, not a criminal defendant, here.

1 where *compliance* is required, which, in this case, is the Central District of California.
 2 Fed. R. Civ. P. 45(d)(2)(B)(i).⁶

3 Third-party subpoenas are assessed under the law of the jurisdiction enforcing
 4 them. *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1271 (W.D. Wash. 2010) (in a
 5 federal question case, applying Ninth Circuit, rather than Seventh Circuit, law invoking
 6 the reporter’s privilege to grant a Washington state journalist’s Rule 45 motion to quash
 7 while litigation proceeded in Illinois). “Where the court hearing the discovery dispute
 8 and the court hearing the underlying action differ, the court hearing the discovery dispute
 9 must apply the choice of law rules of its forum.” *Wolpin v. Philip Morris Inc.*, 189 F.R.D.
 10 418, 423 (C.D. Cal. 1999) (applying California privilege law in a discovery dispute while
 11 underlying litigation proceeded in the Southern District of Florida). This Court has
 12 jurisdiction over this discovery dispute.

13 Rule 45 explicitly provides for courts to hear discovery disputes while underlying
 14 litigation is pending in other district courts. *See* Fed. R. Civ. P. 45(d)(2)(B)(i). The
 15 underlying civil litigation here is a diversity case in the Southern District of New York
 16 brought by Rapp (from New York) against Fowler (from Maryland). *Anthony Rapp v.*
 17 *Kevin Spacey Fowler*, No. 20-cv-09586-LHK (S.D.N.Y.). Fowler’s present motion to
 18 compel Vary, a California third-party witness for additional deposition testimony and
 19 documents, should be addressed under California law.

20 State substantive law preventing disclosure of information applies where not
 21 preempted by federal law. *Lee v. Glob. Tel*Link Corp.*, No. 15-cv-2495-ODW-PLAX,
 22 2017 WL 10575166, at *7 (C.D. Cal. Sept. 6, 2017) (citing *Robinson v. Kia Motors*
 23 *America, Inc.*, 2011 WL 2433369, at *2 (E.D. Cal. June 13, 2011) (noting that if a state
 24 statute protecting the disclosure of information pursuant to a subpoena is a “substantive
 25 policy statute,” the court then considers whether any federal law preempts the state
 26 statute)). Federal Rule of Civil Procedure 45 explicitly provides for exemption of

27 _____
 28 ⁶ Fowler’s passing request to transfer this motion, should be summarily rejected
 because Vary does not consent to the transfer and Fowler makes no showing of any
 “exceptional circumstances” that would warrant a transfer. F.R.C.P. 45(d)(2)(B)(i).

1 disclosure for “privileged or other protected matter.” Fed. R. Civ. P. 45(d)(3), (e)(2); *see*
 2 *id.* California’s Shield Law is a substantive right enshrined in the California
 3 Constitution. *See Playboy Enters.*, 154 Cal. App. 3d at 27-28. Federal law does not
 4 preempt California’s Shield Law.

5 ***ii. California Has a Greater Interest in Enforcing its***
 6 ***Shield Law.***

7 “[T]he court hearing the discovery dispute must apply the choice of law rules of
 8 its forum.” *Wolpin*, 189 F.R.D. at 423. Applying the California conflict-of-law analysis,
 9 government interests weigh in favor of applying California’s Shield Law, rather than
 10 New York’s reporter’s privilege law as Fowler contends. California courts apply a three-
 11 step government interest conflict-of-law analysis. *Pokorny v. Quixtar, Inc.*, 601 F. 3d
 12 987, 994 (9th Cir. 2010). Generally, the forum will apply its own law of decision, but
 13 the party invoking foreign law bears the burden of showing the foreign forum’s interest.
 14 *Washington Mut. Bank, FA v. Superior Ct.*, 24 Cal. 4th 906, 918 (2001). Fowler has
 15 failed to meet his burden here.

16 First, the court determines whether the relevant law is the same or different.
 17 California’s Shield Law is a state constitutional right and provides absolute immunity for
 18 non-party journalists against disclosing unpublished information in civil litigation. Cal.
 19 Const., art. I, § 2(b); *New York Times*, 51 Cal.3d at 455-56. In contrast, New York’s
 20 reporter’s privilege law is a qualified right subject to a balancing test. N.Y. Civ. Rights
 21 L. § 79-h; *O’Neill v. Oakgrove Const., Inc.*, 523 N.E.2d 277, 277-78 (N.Y. 1988)
 22 (recognizing that N.Y. Const., art. I, § 8 and the First Amendment to the U.S. Constitution
 23 provide a qualified immunity from disclosure for reporters’ information prepared or
 24 collected in the course of newsgathering). In California, there is no balancing test to
 25 determine if California’s Shield Law applies in a civil case; there is absolute protection
 26 from disclosure for third-party reporters’ unpublished newsgathering materials in civil
 27 litigation. *New York Times*, 51 Cal. 3d at 461. Whereas New York state’s qualified
 28 privilege means the reporter’s privilege may be overcome if the disclosure sought is (i)

1 is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's
 2 claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any
 3 alternative source. N.Y. Civ. Rights L. § 79-h(c).⁷ The difference between an absolute
 4 and qualified immunity is material.

5 Second, because the laws are materially different, the court must then determine
 6 what interest each state has in having its law applied. *Washington Mut. Bank*, 24 Cal.
 7 4th at 920. California has a substantial interest in protecting the constitutional rights of
 8 its citizens, while New York's interest here is minimal. As stated above, Vary resides in
 9 California, maintains his files in California, sat for a deposition in California, and
 10 engaged in relevant newsgathering communications from California. Jassy Decl. ¶ 2;
 11 *id.*, Ex. 11 at 70:7-11, 77:17-90:16, 90:2-93:22 (Vary work history). The state of
 12 domicile for the person asserting privilege weighs heavily in choice-of-law analysis. *See*
 13 *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89, 91 (S.D. Cal. 1987)
 14 (applying California state privilege law to discovery dispute while underlying diversity
 15 case proceeded in District of Massachusetts). A source's – e.g., Rapp's – expectation's
 16 when speaking with a California reporter also weighs in favor of applying California law.
 17 *See id.* at 92.

18 Meanwhile, neither party to this discovery dispute – i.e., neither Fowler nor Vary
 19 – is a New York resident, and New York's interest here is only linked to the underlying
 20 litigation in the Southern District of New York. “The fact that the underlying litigation
 21 is pending in [a foreign district] is not controlling.” *Connolly Data Sys.*, 114 F.R.D at
 22 92. Fowler argues that New York has an interest because Vary's former employer,
 23 *BuzzFeed*, is located in New York. But Fowler subpoenaed Vary, not *BuzzFeed*, for the
 24 documents in Vary's control; and Vary has no possession, custody, or control of his

25
 26 ⁷ Even if the Court were to apply New York's qualified privilege law – which
 27 Vary contends would be improper under a choice of law analysis – Fowler would not be
 28 able to overcome New York's qualified privilege which is even more stringent than the
 Ninth Circuit's First Amendment-based qualified privilege discussed below. Because
 Fowler cannot overcome the Ninth Circuit's privilege, he also could not overcome New
 York's privilege.

1 former employer's documents. New York has only tenuous interest in a third-party
2 California journalist's assertion of privilege in a California deposition.

3 To the extent the Court finds New York has any interest (Vary asserts it does not),
4 the Court should then take the final step to select the state whose interests would be
5 "more impaired" if its law were not applied. *Washington Mut. Bank*, 24 Cal. 4th at 920.
6 California, the forum state, the deponent's home state, and the state with the more robust
7 protection for journalists would see its interests more impaired if New York law were
8 applied. California has elevated its protection of journalists to constitutional status,
9 reflecting "an intention to favor the interest of the press in confidentiality over the general
10 and fundamental interest of the state in having civil actions determined upon a full
11 development of material facts." *Playboy*, 201 Cal. App. at 27-28. California has
12 demonstrated a significant government interest in protecting California reporters from
13 overreaching discovery. Disregarding California law would undermine "the paramount
14 law of the state." *Id.* On the other hand, New York has codified its own reporter's shield,
15 albeit a weaker one, into state law. N.Y. Civ. Rights L. § 79-h. From a policy
16 perspective, New York shares California's interest in protecting reporters' unpublished
17 newsgathering materials albeit not as robustly as California does. New York's interests
18 would not be as impaired if California law were applied. Accordingly, government
19 interests favor applying California's Shield Law in this discovery dispute.

20 **c. Vary Did Not Waive Any Rights.**

21 Fowler incorrectly asserts that Vary somehow waived his constitutional rights
22 when *Rapp* disclosed some of his communications with Vary in the discovery process.
23 Rapp is the plaintiff, is a party to this litigation, is not a journalist, and did not act in a
24 newsgathering capacity. Rapp never had a reporter's shield or privilege to assert. The
25 reporter's privilege "belongs to the journalist alone and cannot be waived by persons
26 other than the journalist." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 89
27 F.R.D. 489, 494 (C.D. Cal. 1981) (rejecting the argument that the journalist's privileged
28 was waived when some sources voluntarily identified themselves to the public). Even

1 under the out-of-circuit authority Fowler cites regarding marital communications (not the
 2 reporter's shield or privilege) confirms that "a waiver requires an intentional disclosure
 3 of the content of the confidential communication *by the party seeking to invoke the*
 4 *privilege.*" *United States v. Bahe*, 128 F.3d 1440, 1442 (10th Cir. 1997) (emphasis
 5 added).

6 Fowler points to no authority that requires journalists to intervene and move to
 7 quash in order to preserve the reporter's shield or privilege. Indeed, courts have
 8 rejected the argument that journalists *may* intervene to assert their privilege over
 9 records held by third-party sources. *See, e.g., Greenfield v. Schultz*, 660 N.Y.S.2d 624
 10 (N.Y. Sup. Ct. N.Y. County 1997), *aff'd in part, vacated in part*, 673 N.Y.S.2d 684 (1st
 11 Dep't 1998) (rejecting the *New York Times*' effort to intervene to stop defendant from
 12 producing phone billing records that would reveal an editor's confidential sources).
 13 Vary does and has firmly asserted the Reporter's Privilege/Shield in this discovery
 14 dispute, before the deposition, during the deposition, and after the deposition, and he
 15 has not waived it.

16 * * *

17 California's substantive law applies here, and California's Shield Law affords
 18 Vary with an absolute constitutional right not to disclose "any unpublished information
 19 obtained or prepared in gathering, receiving or processing of information" in this civil
 20 case. Cal. Const., art. I, § 2(b); *New York Times*, 51 Cal. 3d at 456-57, 461-62;
 21 *McGarry*, 154 Cal. App. 4th at 119-20; *Playboy*, 154 Cal. App. 3d at 25. Thus, even if
 22 the Court determines that Fowler's motion is procedurally proper, the Court's
 23 substantive analysis can end here because of the absolute protections afforded to Vary.
 24 The motion should be denied in full and sanctions should be awarded to Vary.

25 **6. Vary Is Also Protected under the First Amendment.**

26 Nearly a half century ago, the United States Supreme Court in *Branzburg v. Hayes*,
 27 408 U.S. 665, 681 (1972), expressly recognized that newsgathering activities qualify for
 28 First Amendment protection: "Without some protection for seeking out the news,

freedom of the press could be eviscerated.” *Id.* The Ninth Circuit has held that *Branzburg* established a constitutionally-based qualified privilege for journalists to resist the disclosure of information gathered or obtained during the course of newsgathering activities: “Rooted in the First Amendment, the privilege is a recognition that society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest ‘of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.’” *Shoen v. Shoen* (“*Shoen I*”), 5 F.3d 1289, 1292 (9th Cir. 1993) (internal citations omitted); *see also U.S. v. Pretzinger*, 542 F.2d 517, 520-521 (9th Cir. 1976) (affirming decision not to compel reporter to disclose source in criminal case, holding that, “district judge must balance the interest of confidentiality of news sources against the needs of the criminal justice system to know the identity of the source”). In holding that the qualified privilege attached to subpoenaed, unpublished, non-confidential information obtained by a book author, the Ninth Circuit stated: “the journalist’s privilege recognized in *Branzburg* [is] a partial First Amendment shield that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike.” *Shoen I*, 5 F.3d at 1292. This privilege reflects “the preferred position of the First Amendment and the importance of a vigorous press.” *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981).

Courts repeatedly have recognized that subpoenas to non-party journalists pose a pernicious threat to freedom of the press. Indeed, “news gathering is *essential* to a free press”:

Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press’ function as a vital source of information is weakened *whenever the ability of journalists to gather news is impaired*.

Zerilli, 656 F.2d at 711 (emphasis added) (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

1 These public policy concerns apply to the compelled disclosure of underlying
2 resource materials, which is precisely the type of material sought here. *Shoen II*, 48 F.3d
3 at 416; *Shoen I*, 5 F.3d at 1294-95 (identifying a number of harms, including the risk of
4 appearing as a “research tool” of the government or private parties); *United States v. La*
5 *Rouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (“We discern a lurking and subtle
6 threat to journalists and their employers if disclosure of outtakes, notes, and other unused
7 information, even if nonconfidential, becomes routine and casually, if not cavalierly,
8 compelled”). This is due in part to the fact that “court-enforced access to journalistic
9 resources would risk the symbolic harm of making journalists appear to be an
10 investigative arm of the judicial system, the government, or private parties.” *Gonzales*
11 *v. NBC*, 194 F.3d 29, 35 (2d Cir. 1999). The Ninth Circuit has also recognized the
12 substantial burden that compliance with subpoenas can impose on reporters, noting that
13 the “frequency of subpoenas would not only preempt the otherwise productive time of
14 journalists and other employees but measurably increase expenditures for legal fees.”
15 *Shoen I*, 5 F.3d at 1295 (citation omitted).

16 The Ninth Circuit holds that the privilege applies broadly to protect both
17 confidential *and non-confidential* material and information. *Shoen I*, 5 F.3d at 1295;
18 *Shoen v. Shoen* (“*Shoen II*”), 48 F.3d 412, 414 (9th Cir. 1995). Disclosure of confidential
19 information or non-confidential unpublished information may be compelled “only upon
20 a showing that the requested material is: (1) unavailable despite exhaustion of all
21 reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an
22 important issue in the case.” *Shoen II*, 48 F.3d at 416. *Shoen II* also requires that the
23 party seeking to overcome the privilege “must [make] a showing of actual relevance; a
24 showing of potential relevance will not suffice.” *Id.* The three-part constitutional test
25 under *Shoen II* is necessarily a “high hurdle against compelled disclosure from third party
26 journalists.” *Harbert v. Priebe*, 466 F. Supp. 2d 1214 (N.D. Cal. 2006). Fowler’s motion
27 makes passing references to these standards, but fails to show how he can satisfy his
28 burden with respect to *any* deposition questions.

a. Fowler’s Deposition Questions About Vary’s Newsgathering Are Not “Clearly Relevant.”

Fowler’s questions about Vary’s newsgathering and unpublished reporting are not “*clearly relevant* to an important issue” in the case. *Shoen II*, 48 F.3d at 416 (emphasis added); *Burke*, 700 F.2d at 77 (holding that First Amendment-privileged materials are not subject to disclosure because a criminal defendant failed to make a “clear and specific showing that [subpoenaed] documents were necessary or critical to the maintenance of his defense”).⁸ As explained in *Shoen II*, the party seeking to overcome the privilege “must [make] a showing of actual relevance; a showing of potential relevance will not suffice.” 48 F.3d at 416. It is not sufficient that the information sought would be “useful.” *Krase v. Graco Children Prod., Inc.*, 79 F.3d 346, 351 (2d Cir. 1996). Instead, there must be a finding that the claim for which the information is to be used “virtually rises or falls” on the admission of the materials. *Id.*⁹

Here, Fowler asserts, without any supporting evidence, that certain portions of Vary’s article may contradict other purported facts recounted by Fowler. For example, Fowler simply asserts that there were “inconsistent details” such as the last time Rapp

⁸ See also *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (holding in criminal case that party issuing subpoena for privileged information must show that material is “highly relevant” and “necessary to the proper presentation of the case”); *United States v. Cuthbertson*, 651 F.2d 189, 196 (3d Cir. 1981) (holding that criminal defendant must prove that information is “crucial to the claim”); *Zerilli*, 656 F.2d at 713 (holding that material sought must “go to the ‘heart of the matter’” and be “crucial to the case”).

⁹ For example, courts reject subpoenas to journalists designed to elicit impeachment evidence. See *Holland v. Centennial Homes, Inc.*, 22 Med. L. Rptr. 2270, 2275 (N.Y. Sup. Ct. 1985); *New York v. Troiano*, 11 Med. L. Rptr. 1896, 1899-1900 (N.Y. Sup. Ct. 1985) (asserted need for cross-examination material inadequate to overcome privilege because not critical; applying federal and state journalist’s privilege). Even in criminal cases, and even when the information is non-confidential, the need for privileged newsgathering information for purposes of impeachment generally is not sufficient to overcome the qualified privilege. See, e.g., *Burke*, 700 F.2d at 78. See also *United States v. Fields*, 663 F.2d 880, 881 (9th Cir. 1981) (a pre-trial subpoena to a non-party in a criminal case may not be used to gather evidence simply for possible impeachment).

1 saw Fowler (whether it was at the 2008 Tony Awards or on another occasion) and the
2 purported age of Rapp's friend (a certain John Barrowman), but, even if there were
3 inconsistencies, none of that is "clearly relevant" to whether Fowler assaulted Rapp in
4 1986. Nothing about Rapp's case against Fowler for assault, battery, and IIED "rises or
5 falls" on these details. In any event, the privilege may not be pierced on speculation that
6 it will lead to impeachment evidence. *See Burke*, 700 F.2d at 78; *Fields*, 663 F.2d at 881.

7 Vary and his work are not on trial. Vary stands by his newsgathering and the
8 accuracy of his articles, but nothing is stopping Fowler from trying to convince a jury
9 that certain aspects of Rapp's story are false or inconsistent. Whether there are
10 inaccuracies or contradictions in Vary's work in 2017-2018 – which Vary denies – are
11 not "clearly relevant" to whether Fowler sexually assaulted Rapp in 1986, when Rapp
12 was 14 years old. Such supposed inconsistencies are not "clearly relevant," *Shoen II*, 48
13 F.3d at 416, nor can they otherwise be considered "crucial to the case," *Zerilli*, 656 F.2d
14 at 713.

15 **b. Fowler Does Not Show He Has Exhausted Alternative**
16 **Sources.**

17 Virtually all cases applying the privilege agree that discovery should be denied
18 unless the requesting party has exhausted all alternative sources of obtaining the needed
19 information. For example, in *Cuthbertson*, 651 F.2d at 196, the Third Circuit held that
20 the criminal defendants had not satisfied the element of proving that the "only practical
21 access to the information" sought was from outtakes of interviews, noting that the
22 defendants could "themselves interview these same interviewees, whose identity they
23 know, to obtain the desired information." Similarly, in *New Jersey v. Boiardo*, 414 A.2d
24 14, 21 (N.J. 1980), the court quashed a subpoena served by a criminal defendant who
25 sought letters written by one of the prosecution's witnesses to a journalist. The court's
26 decision was based in part on the fact that the defendant had failed to show that the
27 information contained in the letters was unavailable from other sources, even if the
28 precise letters were not available from other sources. *Id.* at 23.

1 Here, Fowler has not shown that he has exhausted all alternative sources. For
 2 example, he references Vary's and Rapp's purported discussions about a Mr.
 3 Barrowman, but Fowler has not established that he deposed or even interviewed Mr.
 4 Barrowman. Fowler also contends that "Rapp also has mischaracterized Mr. Fowler's
 5 response to Mr. Vary's request for comment on his BuzzFeed article." Even if that were
 6 true, Vary would not be able to speak to Rapp's characterizations of Fowler's response,
 7 and Fowler can make his own assertions about his own response (or lack thereof) to
 8 Vary's repeated requests for comment.

9 **c. Fowler Failed to Show That the Requested Information**
 10 **Would Not Be Cumulative.**

11 Cumulative information cannot reach the level of significance required to
 12 overcome the reporter's privilege. *Shoen II*, 48 F.3d at 416; *Burke*, 700 F.2d at 78
 13 (subpoena quashed because information sought by criminal defendant "would be merely
 14 cumulative and would not defeat [the] First Amendment privilege"). Here, for example,
 15 Fowler insists on getting texts from Vary that he already obtained pursuant to document
 16 requests from Rapp as a party litigant and asking questions about the messages that he
 17 could (or should have) asked Rapp.

18 In sum, Fowler has not articulated how he can overcome all three prongs of the
 19 Ninth Circuit's First Amendment-based privilege for *each* question he wants to ask Vary
 20 again in deposition, and the Court should not be put to the task of doing that for him. For
 21 this additional reason, Fowler's motion as to the Deposition Subpoena should fail.

22 **7. Vary Is Further Protected by the Common Law.**

23 While the Ninth Circuit has recognized the qualified privilege as constitutionally
 24 based, federal common law independently supports a journalist's privilege. This
 25 privilege arises under Federal Rule of Evidence Rule 501, which was adopted after
 26 *Branzburg* and provides in relevant part that "privilege(s) ... shall be governed by the
 27 principles of the common law as they may be interpreted by the courts of the United
 28

1 States in the light of reason and experience.” Fed. R. Evid. 501.¹⁰ The House Report
 2 accompanying the 1975 adoption of Rule 501 explained that the federal common law of
 3 privileges is “to be developed by the courts of the United States under a uniform standard
 4 applicable both in civil and criminal cases.” Fed. R. Evid. 501, Adv. Comm. Note, H.R.
 5 No. 93-650 (1974).

6 In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the United States Supreme Court
 7 established the framework for evaluating privileges under the federal common law. As
 8 a guide to interpreting Rule 501, the Court referred to the “oft-repeated observation that
 9 ‘the common law is not immutable but flexible, and by its own principles adapts itself to
 10 varying conditions.’” *Id.* at 8.¹¹ The Second Circuit held that, “[a]bsent a federal statute
 11 to provide specific instructions, courts which must attempt to divine the contours of non-
 12 statutory federal law governing the compelled disclosure of confidential journalistic
 13 sources must rely on both judicial precedent and well-informed judgment as to the proper
 14 federal public policy to be followed in each case.” *Baker*, 470 F.2d at 781. For example,
 15 in *Los Angeles Memorial Coliseum Comm’n*, 89 F.R.D. at 492, a federal court in
 16 California recognized the well-established qualified federal common law privilege and
 17 applied the privilege in a civil case covering journalists’ sources and non-confidential
 18 work product.

20 ¹⁰ But as detailed above, state privilege law may apply in diversity cases. Fed. R.
 21 Evid. 501.

22 ¹¹ The legislative history of Rule 501 – dating back more than forty years –
 23 anticipated that the law of privilege would evolve to recognize a journalist’s privilege.
 24 For example, Representative Hungate, Chair of the House Judiciary Subcommittee on
 25 Criminal Justice and principal draftsman of Rule 501, believed that the rule “permits the
 26 courts to develop a privilege for newspaperpeople on a case-by-case basis,” and made
 27 clear that “[t]he language cannot be interpreted as a congressional expression in favor of
 28 having no such privilege, nor can the conference action be interpreted as denying to
 newspaperpeople any protection they may have from State newspaper’s privilege laws.”
 120 Cong. Rec. H12253-54 (daily ed. Dec. 18, 1974). *See also Riley v. Chester*, 612 F.2d
 708, 714 (3d Cir. 1979) (legislative history of Rule 501 “manifests that its flexible
 language was designed to encompass, *inter alia*, a reporter’s privilege not to disclose a
 source”).

1 The Ninth Circuit directs federal district courts to look to state law for guidance
 2 when the State has directly addressed the issue. *Gorenc v. Salt River Project Agric.*
 3 *Improvement & Power District*, 869 F.2d 503, 505 (9th Cir. 1989); *see also Jaffee*, 518
 4 U.S. at 12-13 (same). There is widespread consensus among the States regarding the
 5 existence and value of a journalist's privilege. Forty states (including California), as well
 6 as the District of Columbia, have codified the reporter's privilege.¹² Courts in nine
 7 additional states have recognized the journalist's privilege in at least some context in
 8 case law.¹³ Wyoming is the only State that has not weighed in.

9
 10 ¹² See Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300, *et seq.*; Ariz. Rev. Stat.
 11 Ann. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Const. art. I, § 2(b); Cal.
 12 Evid. Code § 1070; Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101, *et seq.*; Conn. Gen. Stat.
 13 Ann. § 52-146t; Del. Code. Ann. tit. 10, §§ 4320, *et seq.*; D.C. Code Ann. §§ 16-4702-
 14 4704; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-5-508; 735 Ill. Comp. Stat. 5/8-
 15 901, *et seq.*; Ind. Code § 34-46-4-1, 34-46-4-2; Kan. Stat. Ann. §§ 60-480, *et seq.*; Ky.
 16 Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-59; 16 Me. Rev. Stat. Ann. §
 17 61; Md. Code Ann. Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws § 767.5a; Minn. Stat.
 18 §§ 595.021, *et seq.*; Mont. Code Ann. §§ 26-1-901, *et seq.*; Neb. Rev. Stat. §§ 20-144, *et*
 19 *seq.*; Nev. Rev. Stat. Ann. § 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A21, *et seq.*; N.M.
 20 Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent.
 Code § 31-01-06.2; Ohio Rev. Code. Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12,
 § 2506; Or. Rev. Stat. §§ 44.510, *et seq.*; 42 Pa. Cons. Stat. Ann. § 5942; R.I. Gen. Laws
 §§ 9-19.1-1, *et seq.*; S.C. Code Ann. § 19-11-100; S.D. HB 1074 (signed Mar. 5, 2019);
 Tenn. Code Ann. § 24-1-208; Tex. Civ. Proc. & Rem. Code §§ 22.021 *et seq.*; Tex. Code
 of Crim. Proc. Act 38.11 & 38.111; Utah Rule of Evid. 509; Wash. Rev. Code § 5.68.010;
 W. Va. Code § 57-3-10; Wis. Stat. Ann. § 885.14.

21 ¹³ See *Belanger v. City and County of Honolulu*, Civ. No. 93-4047-10 (Haw. 1st
 22 Cir. Ct. May 4, 1994) (unpublished) (civil); *Idaho v. Salsbury*, 924 P.2d 208 (Idaho 1996)
 23 (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard v. Oxberger*,
 24 258 N.W.2d 847 (Iowa 1977) (civil); *In re John Doe Grand Jury Investigation*, 574
 25 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott v. Boston Retirement Board*, 524 N.E.2d
 26 100 (Mass. 1988) (civil); *Ayash v. Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass.
 27 2005) (civil); *Eason v. Federal Broad. Co.*, 697 So. 2d 435, 437 (Miss. 1997); *Hawkins*
 28 *v. Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished opinion)
 (based on Miss. Const.); *Pope v. Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st
 Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.) (civil); *Mississippi v. Hand*, No.
 CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal); *In*
re Grand Jury Subpoena, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished
 opinion) (grand jury); *Missouri ex rel. Classic III, Inc.*, 954 S.W.2d 650 (Mo. Ct. App.

1 The federal common law, as it looks to state law (in this case California law), is
 2 robust and provides another avenue and layer of protection for Vary. Again, California
 3 law provides an absolute protection against the disclosure of any type of unpublished
 4 information from a journalist in a civil case. Fowler's briefing does not address the
 5 federal common law even though it was raised repeatedly by Vary's counsel. *See, e.g.,*
 6 Ex. 7 at 7-9.

7 For all of the foregoing reasons, Fowler's motion as to the Deposition Subpoena
 8 should be denied.

9 **V. DOCUMENT SUBPOENA**

10 **A. Document Request No. 1**

11 ***Mr. Fowler's Request No. 1:***

12 All Documents Concerning any Communication between You and Plaintiff about
 13 Fowler.

14 ***Vary's Response to Request No. 1 :***

15 Vary incorporates by reference, as if fully set forth herein, the General Objections
 16 set forth above. Vary objects to this Request to the extent that it calls for material
 17 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 18 to the extent that it calls for material protected from disclosure by the attorney-client
 19 privilege, the attorney work product doctrine, and any other applicable privilege or
 20 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 21 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 22 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 23 extent that it calls for material that is publicly available and/or equally accessible to the
 24 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not

25
 26 _____
 27 1997) (civil); *New Hampshire v. Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of*
 28 *Justices*, 373 A.2d 644 (N.H. 1977 (civil statutory proceeding); *Vermont v. St. Peter*, 315
 A.2d 254 (Vt. 1974) (criminal); *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974) (criminal);
Clemente v. Clemente, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Co. v. ABC*, 36 Va.
 Cir. 1 (1995) (civil).

1 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
2 it calls for material that is not relevant and/or not reasonably calculated to lead to the
3 discovery of admissible evidence. Vary objects to this Request on the grounds that the
4 burden associated with searching for and producing potentially responsive materials, if
5 any, is not proportionate to the relevance, if any, of the requested material.

6 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
7 ***to Document Request No. 1:***

8 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
9 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
10 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
11 made no showing that any reporters' privilege/shield applies to some or all documents
12 called for by this request. Even if some material were covered by that protection, it does
13 not apply for the reasons explained above, especially given there is no suggestion it
14 implicates confidential information. During the meet and confer conference between
15 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
16 confidential sources. The material sought by this request cannot be obtained elsewhere
17 and is necessary for important issues in this case, including Rapp's credibility and the
18 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
19 information.

20 Mr. Vary's other objections likewise are without merit. This request does not call
21 for any attorney-client privileged or work product information, nor has Vary shown
22 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
23 Vary already has known about and implicitly acquiesced to the production of his text
24 messages with Rapp.

25 Mr. Vary's claims that this request calls for material outside his possession or
26 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
27 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
28 *See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23).* Mr. Vary also

1 acknowledged he has not even attempted to look for any documents responsive to the
2 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
3 unsubstantiated and illusory.

4 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
5 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
6 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
7 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
8 – must “describe the nature of the withheld documents, communications, or tangible
9 things in a manner that, without revealing information itself privileged or protected, will
10 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
11 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
12 responsive documents.

13 ***Mr. Vary's Statement Regarding Request No. 1:***

14 Vary drew consistent lines for the Document Subpoena: (1) Vary offered to
15 produce published articles concerning Fowler, but Fowler's counsel stated that they
16 already had the published articles and did not want them from Vary; (2) Vary produced
17 his very limited direct communications with Rapp's counsel; (3) Vary would *not* produce
18 unpublished newsgathering information concerning his reporting because of the
19 reporter's privilege/shield as covered by California's Shield Law (Constitution, Art. 1, §
20 2(b) and California Evidence Code § 1070(a)), the Ninth Circuit's First Amendment-
21 based privilege and the common law; and (4) he would not undertake to search for or
22 produce irrelevant documents – *i.e.*, documents that did not relate to Fowler, Rapp and
23 the allegations in this case – unless Fowler could articulate in the meet and confer process
24 a reason such material was relevant, but Fowler's counsel did not articulate any such
25 reasons. *See* Ex. 7 at 10; Jassy Decl. ¶ 8. During the meet and confer process, Vary's
26 counsel also offered to discuss any documents that did not fall into the aforementioned
27 categories, but Fowler's counsel did take up Vary's counsel on that offer either. *Id.*

28

1 Vary repeatedly explained, categorically, what was being withheld on the basis of
2 the Reporter's Privilege/Shield. For example, Vary's counsel's letter of January 5, 2022
3 repeated the positions taken since before the Vary deposition about the document
4 requests:

5 Our position is that all of Defendant's requests for
6 production call for material protected from disclosure by,
7 among other things, the Reporter's Privilege/Shield. Indeed,
8 some do expressly and directly ... Without conceding that
9 any documents Mr. Vary may have are relevant to this case,
10 Mr. Vary's only potentially relevant connection to this case
11 is in his capacity as a journalist and any documents he may
12 have pertaining to the matter (such as notes, drafts,
13 communications with sources and editors, etc.) were
gathered and/or generated in the course of newsgathering,
and are therefore protected from disclosure by the Reporter's
Privilege/Shield. Any documents that are not protected by
the Reporter's Privilege/Shield would not be relevant.

14 Ex. 7 at 9.¹⁴ Taking Request No. 1, for example, which asks for all communications
15 between Rapp and Vary about Fowler, Vary's position is that *all* such communications
16 and *all* documents "concerning" such communications would fall within either the
17 Reporter's Privilege/Shield (if unpublished) or would be part of published articles
18 (which Fowler's counsel already had and did not want or need from Vary).

19 As discussed above, Fowler cannot overcome the absolute protection from
20 disclosure afforded by California's Shield Law. Moreover, he does not articulate how
21 he can satisfy each of the three parts of the Ninth Circuit's First Amendment-based
22 privilege with respect to each Request. And he makes no effort to address the common
23 law privilege.

24 Fowler also insists on forcing Vary to generate a privilege log. Vary's counsel
25 has explained that imposing such a burden on Vary is unwarranted when Vary is making
26 categorical statements about what was privileged. Vary also asked for authority
27

28 ¹⁴ After sending this letter, Vary discovered – and produced – all communications
(which were text messages) between himself and Rapp's counsel. Jassy Decl. ¶ 8.

1 requiring a non-party to produce a privilege log under any circumstances, let alone where
 2 the non-party was making categorical assertions of privilege and was being asked to
 3 comb through *years* of potentially responsive documents and communications that he
 4 would withhold on privilege grounds in any event. Ex. 7 at 9-10. Fowler’s counsel
 5 provided no such authority. By contrast, Vary provided authority supporting Vary’s
 6 position that such a log was not necessary and should not be imposed on Vary. Ex. 7 at
 7 10 (citing *Perry v. Schwarzenegger*, 268 F.R.D. 344, 353 (N.D. Cal. 2010) (in order to
 8 reduce and eliminate unnecessary burdens on non-party, district court upheld magistrate
 9 judge’s ruling that non-party did not have to create a privilege log); *Xcentric Ventures,*
 10 *LLC v. Borodkin*, 934 F.Supp.2d 1125, 1147 (D. Ariz. 2013) (recognizing unfairness of
 11 requiring a non-party to generate a privilege log where the underlying materials would
 12 be privileged in any event)). Fowler’s portion of this joint stipulation does not address
 13 that authority.

14 Fowler issued three document subpoenas to Vary, two with 30 requests and one
 15 with 29 requests. Even one subpoena to a non-party with 29 requests is, on its face, not
 16 consistent with counsel’s obligation to take “reasonable steps to avoid imposing undue
 17 burden or expense” on a subpoenaed non-party. FRCP 45(d)(1). Fowler’s counsel
 18 considered it a compromise to drop just one of 30 requests, and not to seek confidential
 19 sources. It is important to recall that California’s Shield Law and the First Amendment
 20 privilege apply whether or not information is confidential. *See Shoen I*, 5 F.3d at 1295;
 21 *Shoen II*, 48 F.3d at 414; *Delaney*, 50 Cal. 3d at 798; *New York Times*, 51 Cal. 3d at 461-
 22 62; *Miller*, 21 Cal. 4th at 897.

23 It is plain that Fowler (Kevin Spacey) is a well-financed litigant who knows that
 24 it was Vary’s good reporting that opened the floodgates of accusations against Fowler,
 25 by not just Rapp but many others. Fowler knew he had no suit against Vary, having
 26 apologized for what “what would have been deeply inappropriate drunken behavior.”
 27 Ex. 10 at 4. Instead, he is piling on Vary and making every effort possible to burden and
 28 harass him – with an over seven-hour deposition, 29+ document demands (delivered

1 three times) and now this motion – all with the unabashed aim to strip Vary of his
 2 constitutional rights. Fowler’s conduct is an abusive and harassing vendetta against a
 3 non-party.

4 Vary respectfully requests that the Court award fees and cost sanctions against
 5 Fowler under its inherent power and/or FRCP 45(d)(2)(B)(ii). *See also Legal Voice v.*
 6 *Stormans Inc.*, 738 F.3d 1178, 1184 (9th Cir. 2013); *Nitsch v. DreamWorks Animation*
 7 *SKG Inc.*, 2017 WL 930809 (N.D. Cal. Mar. 9, 2017). Vary’s counsel has incurred more
 8 than \$18,000 in fees and costs on this motion alone, *not including* sitting for a more than
 9 seven-hour deposition and responding to Fowler’s *seriatum* subpoenas. Jassy Decl. ¶ 9.

10 Finally, Vary does not want to burden the Court with repetitive analyses with
 11 respect to all of the following Requests. Instead, Vary will refer back to this Response,
 12 and note any particular additional issues that may be unique to other Requests. For
 13 example, to avoid repetition, Vary notes that each of Fowler’s broad requests calling for
 14 “All Documents concerning” various subjects arguably encompasses attorney-client
 15 privileged materials that Vary should not have to disclose.

16
 17 **B. Document Request No. 2**

18 ***Mr. Fowler’s Request No. 2:***

19 All Documents Concerning any Communication between You and Plaintiff about
 20 Fowler's alleged sexual abuse and/or assault of Plaintiff.

21 ***Mr. Vary’s Response to Request No. 2:***

22 Vary incorporates by reference, as if fully set forth herein, the General Objections
 23 set forth above. Vary objects to this Request to the extent that it calls for material
 24 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 25 to the extent that it calls for material protected from disclosure by the attorney-client
 26 privilege, the attorney work product doctrine, and any other applicable privilege or
 27 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 28 protected from disclosure by the right to privacy. Vary objects to this Request as vague,

1 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
2 extent that it calls for material that is publicly available and/or equally accessible to the
3 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
4 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
5 it calls for material that is not relevant and/or not reasonably calculated to lead to the
6 discovery of admissible evidence. Vary objects to this Request on the grounds that the
7 burden associated with searching for and producing potentially responsive materials, if
8 any, is not proportionate to the relevance, if any, of the requested material.

9 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
10 ***to Document Request No. 2 :***

11 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
12 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
13 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
14 made no showing that any reporters' privilege/shield applies to some or all documents
15 called for by this request. Even if some material were covered by that protection, it does
16 not apply for the reasons explained above, especially given there is no suggestion it
17 implicates confidential information. During the meet and confer conference between
18 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
19 confidential sources. The material sought by this request cannot be obtained elsewhere
20 and is necessary for important issues in this case, including Rapp's credibility and the
21 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
22 information.

23 Mr. Vary's other objections likewise are without merit. This request does not call
24 for any attorney-client privileged or work product information, nor has Vary shown
25 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
26 Vary already has known about and implicitly acquiesced to the production of his text
27 messages with Rapp.

1 Mr. Vary's claims that this request calls for material outside his possession or
 2 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 3 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 4 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 5 acknowledged he has not even attempted to look for any documents responsive to the
 6 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 7 unsubstantiated and illusory.

8 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 9 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 10 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 11 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 12 – must “describe the nature of the withheld documents, communications, or tangible
 13 things in a manner that, without revealing information itself privileged or protected, will
 14 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 15 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 16 responsive documents.

17 ***Mr. Vary's Statement Regarding Request No. 2:***

18 Vary respectfully refers the Court to his statement regarding Request No. 1.
 19

20 **C. Document Request No. 3**

21 ***Mr. Fowler's Request No. 3:***

22 All Documents Concerning any action You took relating to Fowler's alleged
 23 sexual abuse and/or assault of Plaintiff after learning of it.

24 ***Mr. Vary's Response to Request No. 3:***

25 Vary incorporates by reference, as if fully set forth herein, the General Objections
 26 set forth above. Vary objects to this Request to the extent that it calls for material
 27 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 28 to the extent that it calls for material protected from disclosure by the attorney-client

1 privilege, the attorney work product doctrine, and any other applicable privilege or
2 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
3 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
4 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
5 extent that it calls for material that is publicly available and/or equally accessible to the
6 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
7 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
8 it calls for material that is not relevant and/or not reasonably calculated to lead to the
9 discovery of admissible evidence. Vary objects to this Request on the grounds that the
10 burden associated with searching for and producing potentially responsive materials, if
11 any, is not proportionate to the relevance, if any, of the requested material.

12 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
13 ***to Document Request No. 3:***

14 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
15 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
16 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
17 made no showing that any reporters' privilege/shield applies to some or all documents
18 called for by this request. Even if some material were covered by that protection, it does
19 not apply for the reasons explained above, especially given there is no suggestion it
20 implicates confidential information. During the meet and confer conference between
21 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
22 confidential sources. The material sought by this request cannot be obtained elsewhere
23 and is necessary for important issues in this case, including Rapp's credibility and the
24 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
25 information.

26 Mr. Vary's other objections likewise are without merit. This request does not call
27 for any attorney-client privileged or work product information, nor has Vary shown
28 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.

1 Vary already has known about and implicitly acquiesced to the production of his text
2 messages with Rapp.

3 Mr. Vary's claims that this request calls for material outside his possession or
4 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
5 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
6 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
7 acknowledged he has not even attempted to look for any documents responsive to the
8 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
9 unsubstantiated and illusory.

10 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
11 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
12 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
13 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
14 – must “describe the nature of the withheld documents, communications, or tangible
15 things in a manner that, without revealing information itself privileged or protected, will
16 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
17 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
18 responsive documents.

19 ***Mr. Vary's Statement Regarding Request No. 3:***

20 Vary respectfully refers the Court to his statement regarding Request No. 1.

21
22 **D. Document Request No. 4**

23 ***Mr. Fowler's Request No. 4:***

24 All Documents Concerning any Communication between You and Plaintiff about
25 any claim by Plaintiff of sexual misconduct or sexual assault.

26 ***Mr. Vary's Response to Request No. 4:***

27 Vary incorporates by reference, as if fully set forth herein, the General Objections
28 set forth above. Vary objects to this Request to the extent that it calls for material

1 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
2 to the extent that it calls for material protected from disclosure by the attorney-client
3 privilege, the attorney work product doctrine, and any other applicable privilege or
4 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
5 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
6 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
7 extent that it calls for material that is publicly available and/or equally accessible to the
8 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
9 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
10 it calls for material that is not relevant and/or not reasonably calculated to lead to the
11 discovery of admissible evidence. Vary objects to this Request on the grounds that the
12 burden associated with searching for and producing potentially responsive materials, if
13 any, is not proportionate to the relevance, if any, of the requested material.

14 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
15 ***to Document Request No. 4:***

16 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
17 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
18 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
19 made no showing that any reporters' privilege/shield applies to some or all documents
20 called for by this request. Even if some material were covered by that protection, it does
21 not apply for the reasons explained above, especially given there is no suggestion it
22 implicates confidential information. During the meet and confer conference between
23 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
24 confidential sources. The material sought by this request cannot be obtained elsewhere
25 and is necessary for important issues in this case, including Rapp's credibility and the
26 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
27 information.

1 Mr. Vary's other objections likewise are without merit. This request does not call
 2 for any attorney-client privileged or work product information, nor has Vary shown
 3 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
 4 Vary already has known about and implicitly acquiesced to the production of his text
 5 messages with Rapp.

6 Mr. Vary's claims that this request calls for material outside his possession or
 7 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 8 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 9 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 10 acknowledged he has not even attempted to look for any documents responsive to the
 11 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 12 unsubstantiated and illusory.

13 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 14 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 15 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 16 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 17 – must “describe the nature of the withheld documents, communications, or tangible
 18 things in a manner that, without revealing information itself privileged or protected, will
 19 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 20 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 21 responsive documents.

22 ***Mr. Vary's Statement Regarding Request No. 4:***

23 Vary respectfully refers the Court to his statement regarding Request No. 1.
 24

25 **E. Document Request No. 5**

26 ***Mr. Fowler's Request No. 5:***

27 All Documents Concerning any action You took relating to Fowler's alleged
 28 sexual abuse and/or assault of Plaintiff after learning of it.

1 ***Mr. Vary's Response to Request No . 5:***

2 Vary incorporates by reference, as if fully set forth herein, the General Objections
 3 set forth above. Vary objects to this Request to the extent that it calls for material
 4 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 5 to the extent that it calls for material protected from disclosure by the attorney-client
 6 privilege, the attorney work product doctrine, and any other applicable privilege or
 7 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 8 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 9 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 10 extent that it calls for material that is publicly available and/or equally accessible to the
 11 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 12 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
 13 it calls for material that is not relevant and/or not reasonably calculated to lead to the
 14 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 15 burden associated with searching for

16 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
 17 ***to Document Request No. 5:***

18 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 19 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 20 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 21 made no showing that any reporters' privilege/shield applies to some or all documents
 22 called for by this request. Even if some material were covered by that protection, it does
 23 not apply for the reasons explained above, especially given there is no suggestion it
 24 implicates confidential information. During the meet and confer conference between
 25 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 26 confidential sources. The material sought by this request cannot be obtained elsewhere
 27 and is necessary for important issues in this case, including Rapp's credibility and the
 28

1 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
2 information.

3 Mr. Vary's other objections likewise are without merit. This request does not call
4 for any attorney-client privileged or work product information, nor has Vary shown
5 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
6 Vary already has known about and implicitly acquiesced to the production of his text
7 messages with Rapp.

8 Mr. Vary's claims that this request calls for material outside his possession or
9 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
10 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
11 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
12 acknowledged he has not even attempted to look for any documents responsive to the
13 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
14 unsubstantiated and illusory.

15 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
16 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
17 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
18 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
19 – must “describe the nature of the withheld documents, communications, or tangible
20 things in a manner that, without revealing information itself privileged or protected, will
21 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
22 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
23 responsive documents.

24 ***Mr. Vary's Statement Regarding Request No. 5:***

25 Vary respectfully refers the Court to his statement regarding Request No. 1.
26
27
28

1 **F. Document Request No. 6**

2 ***Mr. Fowler's Request No. 6:***

3 All Documents in Your custody, possession, or control Concerning any claim by
4 Plaintiff that he was a victim of sexual misconduct or sexual assault.

5 ***Mr. Vary's Response to Request No . 6:***

6 Vary incorporates by reference, as if fully set forth herein, the General Objections
7 set forth above. Vary objects to this Request to the extent that it calls for material
8 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
9 to the extent that it calls for material protected from disclosure by the attorney-client
10 privilege, the attorney work product doctrine, and any other applicable privilege or
11 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
12 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
13 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
14 extent that it calls for material that is publicly available and/or equally accessible to the
15 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
16 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
17 calls for material that is not relevant and/or not reasonably calculated to lead to the
18 discovery of admissible evidence. Vary objects to this Request on the grounds that the
19 burden associated with searching for and producing potentially responsive materials, if
20 any, is not proportionate to the relevance, if any, of the requested material.

21 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
22 ***to Document Request No. 6:***

23 Mr. Vary's objections to this request are without merit. Mr. Vary's
24 objections based on the "Reporter's Privilege/Shield" are inapposite for the same reasons
25 discussed above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years.
26 He has made no showing that any reporters' privilege/shield applies to some or all
27 documents called for by this request. Even if some material were covered by that
28 protection, it does not apply for the reasons explained above, especially given there is no

1 suggestion it implicates confidential information. During the meet and confer conference
2 between counsel, Mr. Fowler limited the scope by stating he is not seeking information
3 from confidential sources. The material sought by this request cannot be obtained
4 elsewhere and is necessary for important issues in this case, including Rapp's credibility
5 and the details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
6 information.

7 Mr. Vary's other objections likewise are without merit. This request does not call
8 for any attorney-client privileged or work product information, nor has Vary shown
9 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
10 Vary already has known about and implicitly acquiesced to the production of his text
11 messages with Rapp.

12 Mr. Vary's claims that this request calls for material outside his possession or
13 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
14 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
15 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
16 acknowledged he has not even attempted to look for any documents responsive to the
17 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
18 unsubstantiated and illusory.

19 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
20 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
21 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
22 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
23 – must “describe the nature of the withheld documents, communications, or tangible
24 things in a manner that, without revealing information itself privileged or protected, will
25 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
26 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
27 responsive documents.

28

Mr. Vary's Statement Regarding Request No. 6:

Vary respectfully refers the Court to his statement regarding Request No. 1.

G. Document Request No. 9

Mr. Fowler's Request No. 9:

All Documents Concerning any Communication between You and Plaintiff about any sexual encounter involving Plaintiff.

Mr. Vary's Response to Request No. 9:

Vary incorporates by reference, as if fully set forth herein, the General Objections set forth above. Vary objects to this Request to the extent that it calls for material protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request to the extent that it calls for material protected from disclosure by the attorney-client privilege, the attorney work product doctrine, and any other applicable privilege or doctrine. Vary objects to this Request to the extent it calls for the disclosure of material protected from disclosure by the right to privacy. Vary objects to this Request as vague, ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the extent that it calls for material that is publicly available and/or equally accessible to the Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not in Vary's possession, custody, or control. Vary objects to this Request to the extent that it calls for material that is not relevant and/or not reasonably calculated to lead to the discovery of admissible evidence. Vary objects to this Request on the grounds that the burden associated with searching for and producing potentially responsive materials, if any, is not proportionate to the relevance, if any, of the requested material.

Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response to Document Request No. 9:

Mr. Vary's objections to this request are without merit. Mr. Vary's objections based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has

1 made no showing that any reporters' privilege/shield applies to some or all documents
2 called for by this request. Even if some material were covered by that protection, it does
3 not apply for the reasons explained above, especially given there is no suggestion it
4 implicates confidential information. During the meet and confer conference between
5 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
6 confidential sources. The material sought by this request cannot be obtained elsewhere
7 and is necessary for important issues in this case, including Rapp's credibility and the
8 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
9 information.

10 Mr. Vary's other objections likewise are without merit. This request does not call
11 for any attorney-client privileged or work product information, nor has Vary shown
12 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
13 Vary already has known about and implicitly acquiesced to the production of his text
14 messages with Rapp.

15 Mr. Vary's claims that this request calls for material outside his possession or
16 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
17 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
18 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
19 acknowledged he has not even attempted to look for any documents responsive to the
20 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
21 unsubstantiated and illusory.

22 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
23 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
24 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
25 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
26 – must “describe the nature of the withheld documents, communications, or tangible
27 things in a manner that, without revealing information itself privileged or protected, will
28 enable the parties to assess the claim.” Mr. Vary has not provided such information here.

1 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
2 responsive documents.

3 ***Mr. Vary's Statement Regarding Request No. 9:***

4 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
5 adds that this overbroad request calls for an unwarranted invasion of the right to privacy.

6
7 **H. Document Request No. 11**

8 ***Mr. Fowler's Request No. 11:***

9 All Documents Concerning Any Communication between You and Plaintiff about
10 any psychological injury or emotional distress suffered by Plaintiff.

11 ***Mr. Vary's Response to Request No. 11:***

12 Vary incorporates by reference, as if fully set forth herein, the General Objections
13 set forth above. Vary objects to this Request to the extent that it calls for material
14 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
15 to the extent that it calls for material protected from disclosure by the attorney-client
16 privilege, the attorney work product doctrine, and any other applicable privilege or
17 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
18 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
19 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
20 extent that it calls for material that is publicly available and/or equally accessible to the
21 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
22 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
23 it calls for material that is not relevant and/or not reasonably calculated to lead to the
24 discovery of admissible evidence. Vary objects to this Request on the grounds that the
25 burden associated with searching for and producing potentially responsive materials, if
26 any, is not proportionate to the relevance, if any, of the requested material.

1 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
2 ***to Document Request No. 11:***

3 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
4 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
5 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
6 made no showing that any reporters' privilege/shield applies to some or all documents
7 called for by this request. Even if some material were covered by that protection, it does
8 not apply for the reasons explained above, especially given there is no suggestion it
9 implicates confidential information. During the meet and confer conference between
10 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
11 confidential sources. The material sought by this request cannot be obtained elsewhere
12 and is necessary for important issues in this case, including Rapp's credibility and the
13 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
14 information.

15 Mr. Vary's other objections likewise are without merit. This request does not call
16 for any attorney-client privileged or work product information, nor has Vary shown
17 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
18 Vary already has known about and implicitly acquiesced to the production of his text
19 messages with Rapp.

20 Mr. Vary's claims that this request calls for material outside his possession or
21 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
22 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
23 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
24 acknowledged he has not even attempted to look for any documents responsive to the
25 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
26 unsubstantiated and illusory.

27 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
28 the asserted reporter's privilege or reporter's shield at this time, he should produce a log

1 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
2 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
3 – must “describe the nature of the withheld documents, communications, or tangible
4 things in a manner that, without revealing information itself privileged or protected, will
5 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
6 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
7 responsive documents.

8 ***Mr. Vary’s Statement Regarding Request No. 11:***

9 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
10 adds that this overbroad request calls for an unwarranted invasion of the right to privacy.

11
12 **I. Document Request No. 12**

13 ***Mr. Fowler’s Request No. 12:***

14 All Documents Concerning any Communication between You and Plaintiff about
15 Plaintiff’s experience working on Broadway in “Precious Sons” in approximately 1986.

16 ***Mr. Vary’s Response to Request No. 12:***

17 Vary incorporates by reference, as if fully set forth herein, the General Objections
18 set forth above. Vary objects to this Request to the extent that it calls for material
19 protected from disclosure by the Reporter’s Privilege/Shield. Vary objects to this Request
20 to the extent that it calls for material protected from disclosure by the attorney-client
21 privilege, the attorney work product doctrine, and any other applicable privilege or
22 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
23 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
24 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
25 extent that it calls for material that is publicly available and/or equally accessible to the
26 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
27 in Vary’s possession, custody, or control. Vary objects to this Request to the extent that
28 it calls for material that is not relevant and/or not reasonably calculated to lead to the

1 discovery of admissible evidence. Vary objects to this Request on the grounds that the
2 burden associated with searching for and producing potentially responsive materials, if
3 any, is not proportionate to the relevance, if any, of the requested material.

4 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
5 ***to Document Request No. 12:***

6 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
7 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
8 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
9 made no showing that any reporters' privilege/shield applies to some or all documents
10 called for by this request. Even if some material were covered by that protection, it does
11 not apply for the reasons explained above, especially given there is no suggestion it
12 implicates confidential information. During the meet and confer conference between
13 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
14 confidential sources. The material sought by this request cannot be obtained elsewhere
15 and is necessary for important issues in this case, including Rapp's credibility and the
16 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
17 information.

18 Mr. Vary's other objections likewise are without merit. This request does not call
19 for any attorney-client privileged or work product information, nor has Vary shown
20 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
21 Vary already has known about and implicitly acquiesced to the production of his text
22 messages with Rapp.

23 Mr. Vary's claims that this request calls for material outside his possession or
24 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
25 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
26 *See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23).* Mr. Vary also
27 acknowledged he has not even attempted to look for any documents responsive to the
28

1 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
2 unsubstantiated and illusory.

3 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
4 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
5 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
6 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
7 – must “describe the nature of the withheld documents, communications, or tangible
8 things in a manner that, without revealing information itself privileged or protected, will
9 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
10 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
11 responsive documents.

12 ***Mr. Vary's Statement Regarding Request No. 12:***

13 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
14 adds that this Request is not relevant to this action, and Fowler does not explain how it
15 could be.

16
17 **J. Document Request No. 13**

18 ***Mr. Fowler's Request No. 13:***

19 All Documents Concerning any Communication between You and Plaintiff about
20 Plaintiffs experience working on Broadway in “The Little Prince.”

21 ***Mr. Vary's Response to Request No. 13:***

22 Vary incorporates by reference, as if fully set forth herein, the General Objections
23 set forth above. Vary objects to this Request to the extent that it calls for material
24 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
25 to the extent that it calls for material protected from disclosure by the attorney-client
26 privilege, the attorney work product doctrine, and any other applicable privilege or
27 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
28 protected from disclosure by the right to privacy. Vary objects to this Request as vague,

1 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
2 extent that it calls for material that is publicly available and/or equally accessible to the
3 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
4 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
5 it calls for material that is not relevant and/or not reasonably calculated to lead to the
6 discovery of admissible evidence. Vary objects to this Request on the grounds that the
7 burden associated with searching for and producing potentially responsive materials, if
8 any, is not proportionate to the relevance, if any, of the requested material.

9 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
10 ***to Document Request No. 13:***

11 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
12 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
13 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
14 made no showing that any reporters' privilege/shield applies to some or all documents
15 called for by this request. Even if some material were covered by that protection, it does
16 not apply for the reasons explained above, especially given there is no suggestion it
17 implicates confidential information. During the meet and confer conference between
18 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
19 confidential sources. The material sought by this request cannot be obtained elsewhere
20 and is necessary for important issues in this case, including Rapp's credibility and the
21 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
22 information.

23 Mr. Vary's other objections likewise are without merit. This request does not call
24 for any attorney-client privileged or work product information, nor has Vary shown
25 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
26 Vary already has known about and implicitly acquiesced to the production of his text
27 messages with Rapp.

1 Mr. Vary's claims that this request calls for material outside his possession or
 2 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 3 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 4 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 5 acknowledged he has not even attempted to look for any documents responsive to the
 6 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 7 unsubstantiated and illusory.

8 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 9 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 10 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 11 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 12 – must “describe the nature of the withheld documents, communications, or tangible
 13 things in a manner that, without revealing information itself privileged or protected, will
 14 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 15 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 16 responsive documents.

17 ***Mr. Vary's Statement Regarding Request No. 13:***

18 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 19 adds that this Request is not relevant to this action, and Fowler does not explain how it
 20 could be.

21
 22 **K. Document Request No. 14**

23 ***Mr. Fowler's Request No. 14:***

24 All Documents Concerning any Communication between You and Plaintiff about
 25 Plaintiffs' experience working as an actor in New York before he turned 18 years old.

26 ***Mr. Vary's Response to Request No. 14:***

27 Vary incorporates by reference, as if fully set forth herein, the General Objections
 28 set forth above. Vary objects to this Request to the extent that it calls for material

1 protected from disclosure by the Reporter ' s Privilege/Shield. Vary objects to this
2 Request to the extent that it calls for material protected from disclosure by the attorney-
3 client privilege, the attorney work product doctrine, and any other applicable privilege
4 or doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
5 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
6 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
7 that it calls for material that is publicly available and/or equally accessible to the
8 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
9 in Vary ' s possession, custody or control. Vary objects to this Request to the extent that
10 it calls for material that is not relevant and/or not reasonably calculated to lead to the
11 discovery of admissible evidence. Vary objects to this Request on the grounds that the
12 burden associated with searching for and producing potentially responsive materials, if
13 any, is not proportionate to the relevance, if any, of the requested material.

14 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
15 ***to Document Request No. 14:***

16 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
17 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
18 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
19 made no showing that any reporters' privilege/shield applies to some or all documents
20 called for by this request. Even if some material were covered by that protection, it does
21 not apply for the reasons explained above, especially given there is no suggestion it
22 implicates confidential information. During the meet and confer conference between
23 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
24 confidential sources. The material sought by this request cannot be obtained elsewhere
25 and is necessary for important issues in this case, including Rapp's credibility and the
26 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
27 information.

1 Mr. Vary's other objections likewise are without merit. This request does not call
2 for any attorney-client privileged or work product information, nor has Vary shown
3 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
4 Vary already has known about and implicitly acquiesced to the production of his text
5 messages with Rapp.

6 Mr. Vary's claims that this request calls for material outside his possession or
7 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
8 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
9 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
10 acknowledged he has not even attempted to look for any documents responsive to the
11 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
12 unsubstantiated and illusory.

13 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
14 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
15 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
16 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
17 – must “describe the nature of the withheld documents, communications, or tangible
18 things in a manner that, without revealing information itself privileged or protected, will
19 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
20 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
21 responsive documents.

22 ***Mr. Vary's Statement Regarding Request No. 14:***

23 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
24 adds that this Request is not relevant to this action, and Fowler does not explain how it
25 could be.

1 **L. Document Request No. 15**

2 ***Mr. Fowler's Request No. 15:***

3 All Documents Concerning any Communication between You and Plaintiff about
4 Yul Brynner.

5 ***Mr. Vary's Response to Request No. 15:***

6 Vary incorporates by reference, as if fully set forth herein, the General Objections
7 set forth above. Vary objects to this Request to the extent that it calls for material
8 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
9 to the extent that it calls for material protected from disclosure by the attorney-client
10 privilege, the attorney work product doctrine, and any other applicable privilege or
11 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
12 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
13 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
14 that it calls for material that is publicly available and/or equally accessible to the
15 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
16 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
17 calls for material that is not relevant and/or not reasonably calculated to lead to the
18 discovery of admissible evidence. Vary objects to this Request on the grounds that the
19 burden associated with searching for and producing potentially responsive materials, if
20 any, is not proportionate to the relevance, if any, of the requested material.

21 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
22 ***to Document Request No. 15:***

23 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
24 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
25 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
26 made no showing that any reporters' privilege/shield applies to some or all documents
27 called for by this request. Even if some material were covered by that protection, it does
28 not apply for the reasons explained above, especially given there is no suggestion it

1 implicates confidential information. During the meet and confer conference between
2 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
3 confidential sources. The material sought by this request cannot be obtained elsewhere
4 and is necessary for important issues in this case, including Rapp's credibility and the
5 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
6 information.

7 Mr. Vary's other objections likewise are without merit. This request does not call
8 for any attorney-client privileged or work product information, nor has Vary shown
9 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
10 Vary already has known about and implicitly acquiesced to the production of his text
11 messages with Rapp.

12 Mr. Vary's claims that this request calls for material outside his possession or
13 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
14 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
15 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
16 acknowledged he has not even attempted to look for any documents responsive to the
17 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
18 unsubstantiated and illusory.

19 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
20 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
21 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
22 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
23 – must “describe the nature of the withheld documents, communications, or tangible
24 things in a manner that, without revealing information itself privileged or protected, will
25 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
26 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
27 responsive documents.

28

1 ***Mr. Vary's Statement Regarding Request No. 15:***

2 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
3 adds that this Request is not relevant to this action, and Fowler does not explain how it
4 could be.

5
6 **M. Document Request No. 16**

7 ***Mr. Fowler's Request No. 16:***

8 All Documents Concerning any Communication between You and Plaintiff about
9 Susan Tyrell.

10 ***Mr. Vary's Response to Request No. 16:***

11 Vary incorporates by reference, as if fully set forth herein, the General Objections
12 set forth above. Vary objects to this Request to the extent that it calls for material
13 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
14 to the extent that it calls for material protected from disclosure by the attorney-client
15 privilege, the attorney work product doctrine, and any other applicable privilege or
16 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
17 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
18 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
19 extent that it calls for material that is publicly available and/or equally accessible to the
20 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
21 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
22 it calls for material that is not relevant and/or not reasonably calculated to lead to the
23 discovery of admissible evidence. Vary objects to this Request on the grounds that the
24 burden associated with searching for and producing potentially responsive materials, if
25 any, is not proportionate to the relevance, if any, of the requested material.

1 ***Mr. Fowler’s Statement Regarding the Insufficiency of Mr. Vary’s Response***
2 ***to Document Request No. 16:***

3 Mr. Vary’s objections to this request are without merit. Mr. Vary’s objections
4 based on the “Reporter’s Privilege/Shield” are inapposite for the same reasons discussed
5 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
6 made no showing that any reporters’ privilege/shield applies to some or all documents
7 called for by this request. Even if some material were covered by that protection, it does
8 not apply for the reasons explained above, especially given there is no suggestion it
9 implicates confidential information. During the meet and confer conference between
10 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
11 confidential sources. The material sought by this request cannot be obtained elsewhere
12 and is necessary for important issues in this case, including Rapp’s credibility and the
13 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
14 information.

15 Mr. Vary’s other objections likewise are without merit. This request does not call
16 for any attorney-client privileged or work product information, nor has Vary shown
17 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
18 Vary already has known about and implicitly acquiesced to the production of his text
19 messages with Rapp.

20 Mr. Vary’s claims that this request calls for material outside his possession or
21 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
22 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
23 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
24 acknowledged he has not even attempted to look for any documents responsive to the
25 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
26 unsubstantiated and illusory.

27 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
28 the asserted reporter’s privilege or reporter’s shield at this time, he should produce a log

1 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 2 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 3 – must “describe the nature of the withheld documents, communications, or tangible
 4 things in a manner that, without revealing information itself privileged or protected, will
 5 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 6 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 7 responsive documents.

8 ***Mr. Vary’s Statement Regarding Request No. 16:***

9 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 10 adds that this Request is not relevant to this action, and Fowler does not explain how it
 11 could be.

12
 13 **N. Document Request No. 17**

14 ***Mr. Fowler’s Request No. 17:***

15 All Documents Concerning any Communication between You and Plaintiff about
 16 Ed Harris.

17 ***Mr. Vary’s Response to Request No. 17:***

18 Vary incorporates by reference, as if fully set forth herein, the General Objections
 19 set forth above. Vary objects to this Request to the extent that it calls for material
 20 protected from disclosure by the Reporter’s Privilege/Shield. Vary objects to this Request
 21 to the extent that it calls for material protected from disclosure by the attorney-client
 22 privilege, the attorney work product doctrine, and any other applicable privilege or
 23 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 24 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 25 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 26 extent that it calls for material that is publicly available and/or equally accessible to the
 27 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 28 in Vary’s possession, custody, or control. Vary objects to this Request to the extent that

1 it calls for material that is not relevant and/or not reasonably calculated to lead to the
2 discovery of admissible evidence. Vary objects to this Request on the grounds that the
3 burden associated with searching for and producing potentially responsive materials, if
4 any, is not proportionate to the relevance, if any, of the requested material.

5 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
6 ***to Document Request No. 17:***

7 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
8 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
9 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
10 made no showing that any reporters' privilege/shield applies to some or all documents
11 called for by this request. Even if some material were covered by that protection, it does
12 not apply for the reasons explained above, especially given there is no suggestion it
13 implicates confidential information. During the meet and confer conference between
14 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
15 confidential sources. The material sought by this request cannot be obtained elsewhere
16 and is necessary for important issues in this case, including Rapp's credibility and the
17 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
18 information.

19 Mr. Vary's other objections likewise are without merit. This request does not call
20 for any attorney-client privileged or work product information, nor has Vary shown
21 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
22 Vary already has known about and implicitly acquiesced to the production of his text
23 messages with Rapp.

24 Mr. Vary's claims that this request calls for material outside his possession or
25 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
26 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
27 *See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23).* Mr. Vary also
28 acknowledged he has not even attempted to look for any documents responsive to the

1 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
2 unsubstantiated and illusory.

3 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
4 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
5 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
6 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
7 – must “describe the nature of the withheld documents, communications, or tangible
8 things in a manner that, without revealing information itself privileged or protected, will
9 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
10 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
11 responsive documents.

12 ***Mr. Vary's Statement Regarding Request No. 17:***

13 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
14 adds that this Request is not relevant to this action, and Fowler does not explain how it
15 could be.

16
17 **O. Document Request No. 18**

18 ***Mr. Fowler's Request No. 18:***

19 All Documents Concerning any Communication between You and Plaintiff about
20 Amy Madigan.

21 ***Mr. Vary's Response to Request No. 18:***

22 Vary incorporates by reference, as if fully set forth herein, the General Objections
23 set forth above. Vary objects to this Request to the extent that it calls for material
24 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
25 to the extent that it calls for material protected from disclosure by the attorney-client
26 privilege, the attorney work product doctrine, and any other applicable privilege or
27 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
28 protected from disclosure by the right to privacy. Vary objects to this Request as vague,

1 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
2 extent that it calls for material that is publicly available and/or equally accessible to the
3 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
4 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
5 it calls for material that is not relevant and/or not reasonably calculated to lead to the
6 discovery of admissible evidence. Vary objects to this Request on the grounds that the
7 burden associated with searching for and producing potentially responsive materials, if
8 any, is not proportionate to the relevance, if any, of the requested material.

9 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
10 ***to Document Request No. 18:***

11 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
12 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
13 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
14 made no showing that any reporters' privilege/shield applies to some or all documents
15 called for by this request. Even if some material were covered by that protection, it does
16 not apply for the reasons explained above, especially given there is no suggestion it
17 implicates confidential information. During the meet and confer conference between
18 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
19 confidential sources. The material sought by this request cannot be obtained elsewhere
20 and is necessary for important issues in this case, including Rapp's credibility and the
21 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
22 information.

23 Mr. Vary's other objections likewise are without merit. This request does not call
24 for any attorney-client privileged or work product information, nor has Vary shown
25 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
26 Vary already has known about and implicitly acquiesced to the production of his text
27 messages with Rapp.

1 Mr. Vary's claims that this request calls for material outside his possession or
 2 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
 3 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
 4 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
 5 acknowledged he has not even attempted to look for any documents responsive to the
 6 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 7 unsubstantiated and illusory.

8 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 9 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 10 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 11 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 12 – must “describe the nature of the withheld documents, communications, or tangible
 13 things in a manner that, without revealing information itself privileged or protected, will
 14 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 15 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 16 responsive documents.

17 ***Mr. Vary's Statement Regarding Request No. 18:***

18 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
 19 adds that this Request is not relevant to this action, and Fowler does not explain how it
 20 could be.

21
 22 **P. Document Request No. 19**

23 ***Mr. Fowler's Request No. 19:***

24 All Documents Concerning any Communication between You and Fowler.

25 ***Mr. Vary's Response to Request No. 19:***

26 Vary incorporates by reference, as if fully set forth herein, the General Objections
 27 set forth above. Vary objects to this Request to the extent that it calls for material
 28 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request

1 to the extent that it calls for material protected from disclosure by the attorney-client
2 privilege, the attorney work product doctrine, and any other applicable privilege or
3 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
4 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
5 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
6 extent that it calls for material that is publicly available and/or equally accessible to the
7 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
8 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
9 it calls for material that is not relevant and/or not reasonably calculated to lead to the
10 discovery of admissible evidence. Vary objects to this Request on the grounds that the
11 burden associated with searching for and producing potentially responsive materials, if
12 any, is not proportionate to the relevance, if any, of the requested material.

13 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
14 ***to Document Request No. 19:***

15 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
16 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
17 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
18 made no showing that any reporters' privilege/shield applies to some or all documents
19 called for by this request. Even if some material were covered by that protection, it does
20 not apply for the reasons explained above, especially given there is no suggestion it
21 implicates confidential information. During the meet and confer conference between
22 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
23 confidential sources. The material sought by this request cannot be obtained elsewhere
24 and is necessary for important issues in this case, including Rapp's credibility and the
25 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
26 information.

27 Mr. Vary's other objections likewise are without merit. This request does not call
28 for any attorney-client privileged or work product information, nor has Vary shown

1 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
2 Vary already has known about and implicitly acquiesced to the production of his text
3 messages with Rapp.

4 Mr. Vary's claims that this request calls for material outside his possession or
5 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
6 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
7 See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
8 acknowledged he has not even attempted to look for any documents responsive to the
9 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
10 unsubstantiated and illusory.

11 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
12 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
13 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
14 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
15 – must “describe the nature of the withheld documents, communications, or tangible
16 things in a manner that, without revealing information itself privileged or protected, will
17 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
18 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
19 responsive documents.

20 ***Mr. Vary's Statement Regarding Request No. 19:***

21 Vary respectfully refers the Court to his statement regarding Request No. 1.
22

23 **Q. Document Request No. 20**

24 ***Mr. Fowler's Request No. 20:***

25 All Documents Concerning any Communication between You and any Person
26 about this lawsuit.
27
28

1 ***Mr. Vary's Response to Request No . 20:***

2 Vary incorporates by reference, as if fully set forth herein, the General Objections
 3 set forth above. Vary objects to this Request to the extent that it calls for material
 4 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 5 to the extent that it calls for material protected from disclosure by the attorney-client
 6 privilege, the attorney work product doctrine, and any other applicable privilege or
 7 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 8 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 9 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 10 extent that it calls for material that is publicly available and/or equally accessible to the
 11 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 12 in Vary' s possession, custody or control. Vary objects to this Request to the extent that
 13 it calls for material that is not relevant and/ or not reasonably calculated to lead to the
 14 discovery of admissible evidence. Vary objects to this Request on the grounds that the
 15 burden associated with searching for and producing potentially responsive materials, if
 16 any, is not proportionate to the relevance, if any, of the requested material.

17 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
 18 ***to Document Request No. 20:***

19 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
 20 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
 21 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
 22 made no showing that any reporters' privilege/shield applies to some or all documents
 23 called for by this request. Even if some material were covered by that protection, it does
 24 not apply for the reasons explained above, especially given there is no suggestion it
 25 implicates confidential information. During the meet and confer conference between
 26 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
 27 confidential sources. The material sought by this request cannot be obtained elsewhere
 28 and is necessary for important issues in this case, including Rapp's credibility and the

1 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
2 information.

3 Mr. Vary's other objections likewise are without merit. This request does not call
4 for any attorney-client privileged or work product information, nor has Vary shown
5 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
6 Vary already has known about and implicitly acquiesced to the production of his text
7 messages with Rapp.

8 Mr. Vary's claims that this request calls for material outside his possession or
9 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
10 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
11 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
12 acknowledged he has not even attempted to look for any documents responsive to the
13 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
14 unsubstantiated and illusory.

15 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
16 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
17 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
18 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
19 – must “describe the nature of the withheld documents, communications, or tangible
20 things in a manner that, without revealing information itself privileged or protected, will
21 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
22 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
23 responsive documents.

24 ***Mr. Vary's Statement Regarding Request No. 20:***

25 Vary respectfully refers the Court to his statement regarding Request No. 1. Vary
26 adds that this Request improperly calls for the disclosure of documents protected from
27 disclosure by the attorney-client privilege.

28

R. Document Request No. 21

Mr. Fowler's Request No. 21:

All Documents Concerning any Communication between You and Peter Saghir, Richard Steigman, Rachel Jacobs, or anyone else at the law firm Gair, Gair, Conason, Rubinowitz, Bloom, Hershenhorn, Steigman & Mackauf, which is counsel for Plaintiff in this action.

Mr. Vary's Response to Request No. 21:

Vary incorporates by reference, as if fully set forth herein, the General Objections set forth above. Vary objects to this Request to the extent that it calls for material protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request to the extent that it calls for material protected from disclosure by the attorney-client privilege, the attorney work product doctrine, and any other applicable privilege or doctrine. Vary objects to this Request to the extent it calls for the disclosure of material protected from disclosure by the right to privacy. Vary objects to this Request as vague, ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent that it calls for material that is publicly available and/or equally accessible to the Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not in Vary's possession, custody or control. Vary objects to this Request to the extent that it calls for material that is not relevant and/or not reasonably calculated to lead to the discovery of admissible evidence. Vary objects to this Request on the grounds that the burden associated with searching for and producing potentially responsive materials, if any, is not proportionate to the relevance, if any, of the requested material.

Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response to Document Request No. 21:

Mr. Vary's objections to this request are without merit. Mr. Vary's objections based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has made no showing that any reporters' privilege/shield applies to some or all documents

1 called for by this request. Even if some material were covered by that protection, it does
2 not apply for the reasons explained above, especially given there is no suggestion it
3 implicates confidential information. During the meet and confer conference between
4 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
5 confidential sources. The material sought by this request cannot be obtained elsewhere
6 and is necessary for important issues in this case, including Rapp's credibility and the
7 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
8 information.

9 Mr. Vary's other objections likewise are without merit. This request does not call
10 for any attorney-client privileged or work product information, nor has Vary shown
11 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
12 Vary already has produced two of his text exchanges with Rapp's counsel, and any
13 remaining messages should also be produced.

14 Mr. Vary's claims that this request calls for material outside his possession or
15 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
16 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
17 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
18 acknowledged he has not even attempted to look for any documents responsive to the
19 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
20 unsubstantiated and illusory.

21 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
22 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
23 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
24 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
25 – must “describe the nature of the withheld documents, communications, or tangible
26 things in a manner that, without revealing information itself privileged or protected, will
27 enable the parties to assess the claim.” Mr. Vary has not provided such information here.

28

1 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
2 responsive documents.

3 ***Mr. Vary's Statement Regarding Request No. 21:***

4 Vary already produced all of the responsive documents he has in response to this
5 Request as Fowler's portion of the Joint Stipulation acknowledges.

6
7 **S. Document Request No. 26**

8 ***Mr. Fowler's Request No. 26:***

9 All Documents Concerning any Communication between You and any Person
10 about Fowler.

11 ***Mr. Vary's Response to Request No. 26:***

12 Vary incorporates by reference, as if fully set forth herein, the General Objections
13 set forth above. Vary objects to this Request to the extent that it calls for material
14 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
15 to the extent that it calls for material protected from disclosure by the attorney-client
16 privilege, the attorney work product doctrine, and any other applicable privilege or
17 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
18 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
19 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
20 extent that it calls for material that is publicly available and/or equally accessible to the
21 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
22 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
23 it calls for material that is not relevant and/or not reasonably calculated to lead to the
24 discovery of admissible evidence. Vary objects to this Request on the grounds that the
25 burden associated with searching for and producing potentially responsive materials, if
26 any, is not proportionate to the relevance, if any, of the requested material.

1 ***Mr. Fowler’s Statement Regarding the Insufficiency of Mr. Vary’s Response***
2 ***to Document Request No. 26:***

3 Mr. Vary’s objections to this request are without merit. Mr. Vary’s objections
4 based on the “Reporter’s Privilege/Shield” are inapposite for the same reasons discussed
5 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
6 made no showing that any reporters’ privilege/shield applies to some or all documents
7 called for by this request. Even if some material were covered by that protection, it does
8 not apply for the reasons explained above, especially given there is no suggestion it
9 implicates confidential information. During the meet and confer conference between
10 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
11 confidential sources. The material sought by this request cannot be obtained elsewhere
12 and is necessary for important issues in this case, including Rapp’s credibility and the
13 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
14 information.

15 Mr. Vary’s other objections likewise are without merit. This request does not call
16 for any attorney-client privileged or work product information, nor has Vary shown
17 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
18 Vary already has known about and implicitly acquiesced to the production of his text
19 messages with Rapp.

20 Mr. Vary’s claims that this request calls for material outside his possession or
21 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
22 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
23 *See, e.g.,* Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23). Mr. Vary also
24 acknowledged he has not even attempted to look for any documents responsive to the
25 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
26 unsubstantiated and illusory.

27 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
28 the asserted reporter’s privilege or reporter’s shield at this time, he should produce a log

1 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 2 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 3 – must “describe the nature of the withheld documents, communications, or tangible
 4 things in a manner that, without revealing information itself privileged or protected, will
 5 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 6 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 7 responsive documents.

8 ***Mr. Vary’s Statement Regarding Request No. 26:***

9 Vary respectfully refers the Court to his statement regarding Request No. 1.

10
 11 **T. Document Request No. 27**

12 ***Mr. Fowler’s Request No. 27:***

13 All Documents, Concerning the article You wrote for BuzzFeed News title, "Actor
 14 Anthony Rapp: Kevin Spacey Made a Sexual Advance Toward Me When I was 14."

15 ***Mr. Vary’s Response to Request No. 27:***

16 Vary incorporates by reference, as if fully set forth herein, the General Objections
 17 set forth above. Vary objects to this Request to the extent that it calls for material
 18 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 19 to the extent that it calls for material protected from disclosure by the attorney-client
 20 privilege, the attorney work product doctrine, and any other applicable privilege or
 21 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 22 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 23 ambiguous, overbroad and unduly burdensome. Vary objects to this Request to the extent
 24 that it calls for material that is publicly available and/or equally accessible to the
 25 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 26 in Vary's possession, custody or control. Vary objects to this Request to the extent that it
 27 calls for material that is not relevant and/or not reasonably calculated to lead to the
 28 discovery of admissible evidence. Vary objects to this Request on the grounds that the

1 burden associated with searching for and producing potentially responsive materials, if
2 any, is not proportionate to the relevance, if any, of the requested material.

3 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
4 ***to Document Request No. 27:***

5 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
6 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
7 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
8 made no showing that any reporters' privilege/shield applies to some or all documents
9 called for by this request. Even if some material were covered by that protection, it does
10 not apply for the reasons explained above, especially given there is no suggestion it
11 implicates confidential information. During the meet and confer conference between
12 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
13 confidential sources. The material sought by this request cannot be obtained elsewhere
14 and is necessary for important issues in this case, including Rapp's credibility and the
15 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
16 information.

17 Mr. Vary's other objections likewise are without merit. This request does not call
18 for any attorney-client privileged or work product information, nor has Vary shown
19 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
20 Vary already has known about and implicitly acquiesced to the production of his text
21 messages with Rapp.

22 Mr. Vary's claims that this request calls for material outside his possession or
23 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
24 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
25 *See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23).* Mr. Vary also
26 acknowledged he has not even attempted to look for any documents responsive to the
27 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
28 unsubstantiated and illusory.

1 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 2 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 3 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 4 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 5 – must “describe the nature of the withheld documents, communications, or tangible
 6 things in a manner that, without revealing information itself privileged or protected, will
 7 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 8 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 9 responsive documents.

10 ***Mr. Vary's Statement Regarding Request No. 27:***

11 Vary respectfully refers the Court to his statement regarding Request No. 1.
 12

13 **U. Document Request No. 28**

14 ***Mr. Fowler's Request No. 28:***

15 All Documents, Including notes, recordings from any interviews, drafts of articles,
 16 or any other materials, Concerning Mr. Rapp's allegations against Mr. Fowler.

17 ***Mr. Vary's Response to Request No. 28:***

18 Vary incorporates by reference, as if fully set forth herein, the General Objections
 19 set forth above. Vary objects to this Request to the extent that it calls for material
 20 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
 21 to the extent that it calls for material protected from disclosure by the attorney-client
 22 privilege, the attorney work product doctrine, and any other applicable privilege or
 23 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
 24 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
 25 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
 26 extent that it calls for material that is publicly available and/or equally accessible to the
 27 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not
 28 in Vary's possession, custody, or control. Vary objects to this Request to the extent that

1 it calls for material that is not relevant and/or not reasonably calculated to lead to the
2 discovery of admissible evidence. Vary objects to this Request on the grounds that the
3 burden associated with searching for and producing potentially responsive materials, if
4 any, is not proportionate to the relevance, if any, of the requested material.

5 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
6 ***to Document Request No. 28:***

7 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
8 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
9 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
10 made no showing that any reporters' privilege/shield applies to some or all documents
11 called for by this request. Even if some material were covered by that protection, it does
12 not apply for the reasons explained above, especially given there is no suggestion it
13 implicates confidential information. During the meet and confer conference between
14 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
15 confidential sources. The material sought by this request cannot be obtained elsewhere
16 and is necessary for important issues in this case, including Rapp's credibility and the
17 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
18 information.

19 Mr. Vary's other objections likewise are without merit. This request does not call
20 for any attorney-client privileged or work product information, nor has Vary shown
21 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
22 Vary already has known about and implicitly acquiesced to the production of his text
23 messages with Rapp.

24 Mr. Vary's claims that this request calls for material outside his possession or
25 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
26 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
27 *See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23).* Mr. Vary also
28 acknowledged he has not even attempted to look for any documents responsive to the

1 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
2 unsubstantiated and illusory.

3 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
4 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
5 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
6 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
7 – must “describe the nature of the withheld documents, communications, or tangible
8 things in a manner that, without revealing information itself privileged or protected, will
9 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
10 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
11 responsive documents.

12 ***Mr. Vary's Statement Regarding Request No. 28:***

13 Vary respectfully refers the Court to his statement regarding Request No. 1.
14

15 **V. Document Request No. 29**

16 ***Plaintiff's Request No. 29:***

17 All Documents in your custody, possession, or control Concerning Fowler.

18 ***Mr. Vary's Response to Request No. 29:***

19 Vary incorporates by reference, as if fully set forth herein, the General Objections
20 set forth above. Vary objects to this Request to the extent that it calls for material
21 protected from disclosure by the Reporter's Privilege/Shield. Vary objects to this Request
22 to the extent that it calls for material protected from disclosure by the attorney-client
23 privilege, the attorney work product doctrine, and any other applicable privilege or
24 doctrine. Vary objects to this Request to the extent it calls for the disclosure of material
25 protected from disclosure by the right to privacy. Vary objects to this Request as vague,
26 ambiguous, overbroad, and unduly burdensome. Vary objects to this Request to the
27 extent that it calls for material that is publicly available and/or equally accessible to the
28 Subpoenaing Party. Vary objects to this Request to the extent that it calls for material not

1 in Vary's possession, custody, or control. Vary objects to this Request to the extent that
2 it calls for material that is not relevant and/or not reasonably calculated to lead to the
3 discovery of admissible evidence. Vary objects to this Request on the grounds that the
4 burden associated with searching for and producing potentially responsive materials, if
5 any, is not proportionate to the relevance, if any, of the requested material.

6 ***Mr. Fowler's Statement Regarding the Insufficiency of Mr. Vary's Response***
7 ***to Document Request No. 29:***

8 Mr. Vary's objections to this request are without merit. Mr. Vary's objections
9 based on the "Reporter's Privilege/Shield" are inapposite for the same reasons discussed
10 above. Mr. Vary is friend with Mr. Rapp and has known him for over 20 years. He has
11 made no showing that any reporters' privilege/shield applies to some or all documents
12 called for by this request. Even if some material were covered by that protection, it does
13 not apply for the reasons explained above, especially given there is no suggestion it
14 implicates confidential information. During the meet and confer conference between
15 counsel, Mr. Fowler limited the scope by stating he is not seeking information from
16 confidential sources. The material sought by this request cannot be obtained elsewhere
17 and is necessary for important issues in this case, including Rapp's credibility and the
18 details of his allegations. Mr. Fowler has exhausted other avenues to obtain this
19 information.

20 Mr. Vary's other objections likewise are without merit. This request does not call
21 for any attorney-client privileged or work product information, nor has Vary shown
22 otherwise. Nor has Vary shown that any right of privacy is implicated by this request.
23 Vary already has known about and implicitly acquiesced to the production of his text
24 messages with Rapp.

25 Mr. Vary's claims that this request calls for material outside his possession or
26 would impose an undue burden are unsubstantiated and without merit. Mr. Vary
27 acknowledged at deposition he likely still possesses at least his text messages with Rapp.
28 *See, e.g., Scolnick Decl., Ex. 1 (Vary Depo. Tr. at 28:16-23).* Mr. Vary also

1 acknowledged he has not even attempted to look for any documents responsive to the
 2 Records Subpoena. *Id.* at 51:5-13, 53:19-22. His claim of undue burden therefore is
 3 unsubstantiated and illusory.

4 Finally, to the extent Mr. Vary is permitted to withhold any documents based on
 5 the asserted reporter's privilege or reporter's shield at this time, he should produce a log
 6 to allow the Court and parties to better evaluate that assertion. Under Federal Rule of
 7 Civil Procedure 45(e)(2)(A)(ii), Mr. Vary – as the subpoenaed party asserting privilege
 8 – must “describe the nature of the withheld documents, communications, or tangible
 9 things in a manner that, without revealing information itself privileged or protected, will
 10 enable the parties to assess the claim.” Mr. Vary has not provided such information here.
 11 Indeed, he acknowledged at deposition he has done nothing to even look for potentially
 12 responsive documents.

13 ***Mr. Vary's Statement Regarding Request No. 29:***

14 Vary respectfully refers the Court to his statement regarding Request No. 1.

15
 16
 17 Dated: January 31, 2022
 18 Irvine, California.

Respectfully submitted,

19 /s/ Chase A. Scolnick

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Chase A. Scolnick

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26
 27 *Counsel for Plaintiff Kevin Spacey*
 28 *Fowler a/k/a Kevin Spacey*

1
2 Dated: February 9, 2022
3 Los Angeles, California.

/s/ Jean-Paul Jassy

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Adam Vary*